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2541
No. 11983

United States
Court of Appeals

for the Ninth Circuit

VERNON O. TYLER,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY, a Corporation, and MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellees.

Transcript of Record

(In Two Volumes)

VOLUME I

(Pages 1 to 38)

FILED

NOV 4 - 1948

PAUL P. O'BRIEN,

Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

No. 11983

United States
Court of Appeals
for the Ninth Circuit

VERNON O. TYLER,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY, a Corporation, and MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellees.

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Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

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Attorneys for Appellees:

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In the District Court of the United States for the
Western District of Washington, Northern Division

No. 1293

VERON O. TYLER, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY and MORRISON -KNUDSEN, INC.,
Defendants.

No. 1408

WILLIAM LESLIE KOHL, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

No. 1420

ARTHUR J. SESSING, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

MOTION FOR PERMISSION TO REOPEN
CAUSES FOR FURTHER PROCEEDINGS,
TO FILE AMENDMENTS TO ANSWERS
AND AFFIRMATIVE DEFENSES OF DE-
FENDANTS, AND TO INTRODUCE TESTI-
MONY IN SUPPORT THEREOF

Comes now S. Birch & Sons Construction Com-
pany, a corporation, and Morrison-Knudsen Com-
pany, Inc., a corporation, defendants, herein, and
respectfully [1*] move the above entitled Court

* Page numbering appearing at foot of page of original
certified Transcript of Record.

for permission to reopen the above entitled Causes for further proceedings, to file therein amendments to the Answers and Affirmative Defenses of the defendants, to plead as further Affirmative Defenses to the plaintiffs' Complaints the following:

V.

That all contracts of employment between the plaintiff and these answering defendants, and all wages and salaries paid thereunder were approved and paid in good faith by defendants in conformity with and in reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit, the United States War Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

VI.

That any act or omission of defendants under the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, was in good faith and in the reasonable belief on the part of the defendants that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended, and that the defendants be permitted by the Court to reopen the above entitled Causes, for the purpose of [2]

permitting defendants to introduce testimony in support of said additional defenses.

This Motion is based upon the files, records and proceedings herein, and upon the accompanying Affidavit of Gerald DeGarmo.

ALLEN, HILEN, FROUDE
& DeGARMO,
By GERALD DeGARMO,
Attorneys for Defendants.

State of Washington,
County of King—ss.

Gerald DeGarmo, being first duly sworn, on oath deposes and says: That he is an Attorney at Law, a member of the law firm of Allen, Hilen, Froude & DeGarmo, and one of the attorneys for the defendants in the above entitled actions.

That the above entitled actions were heard as consolidated Causes for the purpose of trial in the above entitled Court, commencing on the 7th day of May, 1946, and as a result of said trial Findings of Fact, Conclusions of Law and Judgment were entered in each of said Causes on the 28th day of May, 1946. That thereafter, and within the time permitted by law, the defendants in said Causes appealed from said Judgments to the Circuit Court of Appeals for the Ninth Circuit, which appeal was heard upon briefs and oral argument by the Circuit Court of Appeals at San Francisco, California on the 15th day of May, 1947, and said Causes taken under advisement.

That on the 1st day of May, 1947, while said

Causes were pending in the Circuit Court of Appeals for the Ninth Circuit, there was passed by [3] the House and Senate of the United States, and thereafter signed by the President of the United States, so as to become law on the 14th day of May, 1947, H.R. 2157, otherwise designated and known as the "Portal-to-Portal Act of 1947", which said Portal-to-Portal Act of 1947 contains, among others, the following provisions:

"Sec. 9. Reliance on Past Administrative Rulings, Etc.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belongs. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

* * * *

“Sec. 11. Liquidated Damages,—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the Court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act.”

That following the passage of the foregoing mentioned Portal-to-Portal Act of 1947 the defendants [4] herein, and appellants before the Circuit Court of Appeals for the Ninth Circuit, filed in said Appellate Causes, with the Circuit Court of Appeals for the Ninth Circuit, motions to Remand said Causes to the above entitled Court for further proceedings, and in order to permit the defendants herein to take advantage of the provisions of the Portal-to-Portal Act of 1947, heretofore quoted, which said Motions were heard by the Circuit Court of Appeals for the Ninth Circuit on the 7th day of July, 1947 and resulted in the entry of an Order by the Circuit Court of Appeals for the Ninth Circuit on the 15th day of September, 1947, a certified copy of which is on file in each of the above mentioned Causes, and which said Order provides as follows:

“Upon motion of appellants in the above entitled cases all of the said cases are hereby remanded to the trial courts whence they came with instructions that appropriate and proper proceedings be permitted in the referred to court whereby appellants may proffer pleadings to the effect that all defenses permitted by Sections 9 and 10 of the Portal-to-Portal Act of 1947 are put in issue. We herewith make no decision or intimation as to the merits of the proffer.”

And that by Supplemental Order, dated October 13, 1947, said previous Order of September 15, 1947 was modified *nunc pro tunc*, as follows:

“Good cause appearing the order of this court of September 15th, 1947 wherein motions of appellants in the above entitled cases were granted remanding the said cases and that appropriate and proper proceedings be permitted in the trial courts to the end that appellants may proffer pleadings to the effect that all defenses permitted by Sections 9 and 10 of the Portal-to-Portal Act of 1947 are put in issue, is hereby amended *nunc pro tunc* so as to state Sections 9 and 11 of the said Act instead of 9 and 10 thereof.” [5]

That a certified copy of said Order of October 13, 1947 is on file in each of the above entitled Causes.

That each of Sections 9 and 11, heretofore quoted, is applicable to and constitutes a proper defense to the above entitled Causes, and that if permitted to interpose said defenses and introduce testimony in support thereof it can be shown by the defend-

ants herein that in truth and in fact the defendants herein come within the purview of said statute and the provisions heretofore quoted.

GERALD DeGARMO.

Subscribed and sworn to before me this 15th day of October, 1947.

(Seal) NORA E. GREENLAND,
Notary Public in and for the State of Washington,
residing at Seattle.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 15, 1947. [6]

[Title of District Court and Cause.]

ORDER UPON MOTION TO REOPEN CAUSE
FOR FURTHER PROCEEDINGS, TO FILE
AMENDMENT TO ANSWER AND AFFIRM-
ATIVE DEFENSES, AND TO INTRODUCE
TESTIMONY IN SUPPORT THEREOF

This Cause having come on regularly for hearing on the 20th day of October, 1947, before the undersigned, one of the Judges of the above entitled Court, upon the Motion of the defendants herein to reopen this Cause for further proceedings, to file an amendment to their Answer and Affirmative Defenses herein and to introduce testimony in support thereof; and said defendants having appeared by Gerald DeGarmo of Allen, Hilen, Froude & DeGarmo, their Counsel, and the plaintiff having appeared by George J. Toulouse, Jr., and John J.

O'Brien, of Wettrick, Flood & O'Brien and George R. Stuntz, his Counsel; and the Court having considered the Motion of the defendants and the Affidavits in support thereof, and the Affidavits submitted on behalf of the plaintiff in resistance to said Motion, and having examined the files, records and proceedings herein and deeming itself fully advised in the premises:

Now, therefore, it is hereby ordered that the Motion of the defendants herein, to reopen the above entitled Cause for further proceedings, to file an amendment to the Answer and Affirmative Defenses of the defendants herein and to introduce testimony in support thereof, be and the same is hereby granted in all particulars; conditioned, however, upon the terms that the defendants pay to the Attorneys for the plaintiff, within fifteen (15) days from October 20, 1947, the sum of \$482.55, on account of out-of-pocket expense of the plaintiff and his Counsel herein, and the sum of \$600.00, [7] on account of Attorneys' fees, said sums to apply on account of the taxable and allowable costs and the allowance for Attorneys' fees respectively herein in the event of ultimate recovery by the plaintiff herein, but not to be repayable by plaintiff or his Attorneys herein to defendants, or to be taxable as costs and disbursements by the defendants, in the event of final judgment herein in favor of defendants.

The defendants except to that portion of the foregoing Order imposing terms and conditions, and the plaintiff excepts to that portion of the fore-

going Order granting the Motion of the defendants, and the exceptions are hereby allowed.

Done in open court this 31st day of October, 1947.

JOHN C. BOWEN,
District Judge.

Presented by:

GERALD DeGARMO,
Atty. for Defts.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 31, 1947. [8]

[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER AND
AFFIRMATIVE DEFENSE

Come now the defendants herein, and for Supplemental Answer and Additional Affirmative Defenses to the Complaint of the plaintiff, in accordance with leave granted by Order of this Court, dated October 31, 1947, plead and allege as follows:

V.

That all contracts of employment between the plaintiff and the assignors of plaintiff and these answering defendants, and all wages and salaries paid thereunder, were approved and paid in good faith by defendants in conformity with and in reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit, the United States War

Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

VI.

That any act or omission of defendants under the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, or to any of the assignors of plaintiff, was in good faith and in the reasonable belief on the part of the defendants that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended.

Wherefore, the defendants pray that the Complaint of [9] the plaintiff herein, and all causes of action therein set forth, and any additional causes of action as subsequently pleaded by the plaintiff, may be dismissed with prejudice, and that the defendants may have and recover their costs herein.

ALLEN, HILEN, FROUDE
& DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendants.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 4, 1947. [10]

[Title of District Court and Cause.]

MOTION OF THE UNITED STATES TO INTERVENE AND FOR TIME WITHIN WHICH TO FILE BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT OF 1947

Now comes the United States of America, by its Attorney General, and pursuant to the Act of August 24, 1937 (c. 754, sec. 1, 50 Stat. 751, 28 U.S.C. Sec. 401), moves to intervene and become a party to this action for the purposes and with all the rights provided by said Act of August 24, 1937, upon the ground that the constitutionality of the Portal-to-Portal Act of 1947, approved May 14, 1947, has been drawn in question in this action, and neither the United States nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party hereto.

The United States further moves that the Court receive its pleading, entitled "Pleading of the United States in Intervention," which accompanies this motion in accordance with Rule 24(c) of the Federal Rules of Civil Procedure, as its appearance in this action in support of the constitutionality of the said Portal-to-Portal Act of 1947, and in opposition to all pleadings, motions, and proceedings of any of the parties hereto, denying the validity of the said Act, or any part thereof, upon the ground that it is unconstitutional.

The United States moves also for leave to file a brief in support of the constitutionality of the said

Portal-to-Portal Act of 1947, within 30 days after service [11] upon it of plaintiff's brief on the constitutional issue or such other time as the Court may deem reasonable.

TOM C. CLARK,
Attorney General,

By /s/ HERBERT A. BERGSON,
Acting Assistant Attorney
General.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant United States
Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

JOHANNA M. D'AMICO,
Attorney, Department of
Justice.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 11, 1947. [12]

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES IN
INTERVENTION

The United States of America, intervenor herein for its pleading in intervention says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.

2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious question but if the Court should entertain serious doubts concerning the constitutionality of that Act, it should first consider the defenses raised by the defendant which are not based upon the Portal-to-Portal Act of 1947, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question.

Wherefore, the United States of America prays that the Court enter a judgment herein which shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947.

TOM C. CLARK,

Attorney General,

By /s/ HERBERT A. BERGSON,

Acting Assistant Attorney
General.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant United States
Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

JOHANNA M. D'AMICO,
Attorney, Department of
Justice.

Lodged Dec. 11, 1947.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 29, 1947. [13]

[Title of District Court and Cause.]

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing Cause having been tried before the undersigned, one of the Judges of the above entitled Court, in May of 1946 upon the issues as then presented by the pleadings, and Findings of Fact, Conclusions of Law and Judgment, in favor of the plaintiff and against the defendants, having been signed, filed and entered on the 28th day of May, 1946; and said Cause having been thereafter duly appealed by the defendants to the Circuit Court of Appeals for the Ninth Circuit, and having been thereafter remanded by said Court, without decision

upon said appeal, to this Court by Order signed, filed and entered September 15, 1947, as amended by Order, signed, filed and entered October 13, 1947, to permit of the defendants proffering pleadings to interpose the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947; and defendants thereafter having duly moved for and having been granted permission to reopen this Cause and to file amendments to their Answers and Affirmative Defenses herein, to plead the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947, and said amendments having been filed and issue made thereon, and the issues as presented having been tried to the Court, and the Court having taken the Cause under advisement after the filing of briefs and having listened to the argument of counsel, and having heretofore orally announced its decision herein, and being fully advised in the premises; now, therefore, the Court does hereby make the following Supplemental:

FINDINGS OF FACT

I.

That all practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff, and by the plaintiff's assignors, in excess of forty (40) hours in any one work-week, were in good faith, in conformity with and in reliance on Administrative regulations, orders, rulings, approvals and interpretations [14] of the following agencies of the United States, to-wit, the United States War Department, the Corps of Engineers of the United States War Depart-

ment, and the War Department Wage Administration Agency.

II.

That all practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff, and by the plaintiff's assignors, in excess of forty (40) hours in any one work-week, were in good faith, and that the defendants had reasonable ground for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as Amended.

Done in open court this 2nd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

From the foregoing Findings of Fact the Court hereby deduces the following:

CONCLUSIONS OF LAW

I.

That the Portal-to-Portal Act of 1947 is, and Sections 9 and 11 thereof are, constitutional.

II.

That defendants are subject to no liability to the plaintiff, or to plaintiff's assignors, for or on account of defendants' failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as Amended.

III.

That Paragraph 14 of the Findings of Fact, Paragraphs 3, 5 and 7 of the Conclusions of Law, and the Judgment, heretofore entered herein on the 28th

day of May, 1946, in favor of Plaintiff and plaintiff's assignors and against defendants, should be vacated, set aside and held for naught. [15]

IV.

That the action of the plaintiff, and the plaintiff's assignors herein, should be dismissed with prejudice, and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants, to be taxed in accordance with law and the rules of this Court.

Done in open court this 2nd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

Presented by

ALLEN, HILEN, FROUDE
& DeGARMO,

By /s/ GERALD DeGARMO.

(Acknowledgment of Service.)

[Endorsed]: Filed Mar. 2, 1948. [16]

In the District Court of the United States for the
Western District of Washington, Northern Division

No. 1293

VERNON O. TYLER, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY and MORRISON-KNUDSEN, INC.,
Defendants.

No. 1408

WILLIAM LESLIE KOHL, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

No. 1420

ARTHUR J. SESSING, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

SUPPLEMENTAL JUDGMENT

The foregoing Cause having been tried before the undersigned, one of the Judges of the above entitled Court, in May of 1946 upon the issues as then presented by the pleadings, and Findings of Fact, Conclusions of Law and Judgment, in favor of the plaintiff and against the defendant, having been signed, filed and entered on the 28th day of May, 1946; and said Cause having been thereafter duly appealed by the defendants to the Circuit Court of Appeals for the Ninth Circuit, and having been thereafter remanded by said Court, without

decision upon said appeal, to this Court by Order, signed, filed and entered September 15, 1947, as amended by Order, signed, filed and entered October 13, 1947, to permit of the defendants proffering pleadings to interpose the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947; and defendants thereafter having duly moved for and having been granted permission to reopen this Cause and to file amendments to their Answers and Affirmative Defenses herein, to plead the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947, and said amendments having been filed and issue made thereon, and the issues as presented having been tried to the Court, and the Court having taken the Cause under advisement after the filing of briefs and having listened to the argument of counsel, and having heretofore orally announced its decision herein, and having made and entered Supplemental Findings of Fact and Conclusions of Law; and the Court being fully advised:

Now, therefore, it is hereby ordered, adjudged and decreed that Paragraph 14 of the Findings of Fact, Paragraphs 3, 5 and 7 of the Conclusions of Law, and the Judgment, heretofore [17] signed, filed and entered herein on the 28th day of May, 1946, be and the same are hereby vacated, set aside and held for naught.

It is further ordered, adjudged and decreed that the action of the plaintiff, Vernon O. Tyler, and of the plaintiff's assignors, Clifford A. Hood, R. Owen Shumate, Einnar C. Forstein, Louie Lung Kin,

Winthrop H. Raymond and Claude E. Bruner, be and the same are hereby dismissed, with prejudice and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants and against the plaintiff, Vernon O. Tyler, to be taxed in the manner provided by law and by the rules of this Court.

Done in open court this 2nd day of March, 1948.

/s/ JOHN C. BOWEN,

District Judge.

Presented by

ALLEN, HILEN, FROUDE

& DeGARMO,

By /s/ GERALD DeGARMO.

(Acknowledgment of Service.)

[Endorsed]: Filed Mar. 2, 1948. [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Vernon O. Tyler, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that supplemental judgment entered in this action on the 2nd day of March, 1948.

WETTRICK, FLOOD &

O'BRIEN, and GEORGE R.

STUNTZ,

By /s/ GEORGE E. FLOOD,

GEORGE J. TOULOUSE, JR.,

Attorneys for Appellant.

[Endorsed]: Filed Apr. 23, 1948. [19]

[Title of District Court and Cause.]

ORDER TO EXTEND TIME TO FILE RECORD
AND DOCKET ACTION

These causes coming on for hearing on motion to extend the time within which to file a record on appeal and to docket the actions with the Circuit Court of Appeals for the Ninth Circuit, until the 20th day of July, 1948, and good cause appearing therefor, it is hereby

Ordered that the time for the filing for the record on appeal and docketing of the actions in the Circuit Court of Appeals for the Ninth Circuit by the parties hereto, be, and the same is hereby, extended to and including the 20th day of July, 1948.

Done in open court this 28th day of May, 1948.

/s/ JOHN C. BOWEN,
U. S. District Judge.

Presented by:

/s/ FREDERICK PAUL,
Attorney for Plaintiffs.

Approved:

BOGLE, BOGLE & GATES,
By J. TYLER HULL,
Attorney for Guy F. Atkinson
Co.

Approved:

ALLEN, HILEN, FROUDE
& DeGARMO,
By G. DeGARMO,
Attorney for S. Birch & Sons Constr. Co. and Mor-
rison-Knudsen Co.

[Endorsed]: Filed May 28, 1948. [20]

In the District Court of the United States for the
Western District of Washington,
Northern Division

No. 1293

VERNON O. TYLER,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Appellees,

UNITED STATES OF AMERICA,

Intervenor.

DESIGNATION OF PORTIONS OF RECORD
TO BE CONTAINED IN RECORD
ON APPEAL

Plaintiff and appellant hereby designates the following portions of the record to be contained in the record on appeal in the above entitled action:

1. Motion for Permission to Reopen Cause for Further Proceedings.

2. Order upon Motion to Reopen Cause for Further Proceedings.

3. Supplemental Answer and Affirmative Defenses.

4. Motion of the United States to Intervene and for Time Within Which to File Brief in Support of the Constitutionality of the Portal-to-Portal Act of 1947.

5. Pleading of the United States in Intervention.
6. Transcript of Testimony.
7. All exhibits introduced at time of trial.
8. Supplemental Findings of Fact and Conclusions of Law.
9. Supplemental Judgment.
10. Notice of Appeal.
11. Order Extending Time to File Records and Docket Action on Appeal.
12. This Designation.
13. Designation by Appellee of Additional matters to be included in the [21] records, if any.
14. Cost Bond on Appeal.
15. Stipulation Concerning Exhibits on Appeal.
16. Order Concerning Exhibits on Appeal.
17. Stipulation Concerning Record on Appeal.

WETTRICK, FLOOD &
O'BRIEN,
GEORGE R. STUNTZ,
By GEORGE J. TOULOUSE, JR.,
Attorneys for Appellant, Tyler.

(Acknowledgment of Service.)

[Endorsed]: Filed July 9, 1948. [22]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The appellant states that the points upon which he intends to rely upon appeal are the following:

1. The court erred in finding that all practices

of the defendants, or any such practices, with respect to the payment of overtime compensation for all hours worked by the plaintiff, appellant, and by the plaintiff's assignors in excess of forty (40) hours in any one work week were in good faith, in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretation of the following agencies of the United States, to wit: the United States War Department, the Corps of Engineers of the United States War Department and the War Department Wage Administrative Agency, or any agency of the United States.

2. The court erred in finding that all the practices of the defendants, with respect to payment of overtime compensation for all hours worked by the plaintiff and by the plaintiff's assignors, in excess of forty (40) hours in any one work week, were in good faith, and that the defendants had reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as amended. [23]

3. The court erred in finding that the defendants relied in good faith, or at all, upon anything except the contract which they had with the War Department of the United States (Exhibit 13).

4. The court erred in finding and concluding in Paragraph I of the conclusions of law that Sections 9 and 11 of the Portal-to-Portal Act of 1947 is constitutional.

5. The court erred in finding and concluding in Paragraph II of the conclusions of law that the

defendants are subject to no liability to the plaintiff, or to the plaintiff's assignors, for or on account of defendant's failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended.

6. The court erred in finding and concluding in Paragraph III of the conclusions of law that any paragraph of the findings of fact, Paragraphs 3, 5 and 7 of the conclusions of law and the judgment, heretofore entered on the 28th day of May, 1946, in favor of plaintiff and plaintiff's assignors and against the defendants should be vacated, set aside and held for naught.

7. That the court erred in entering judgment herein, dismissing the action of the plaintiff with prejudice.

WETTRICK, FLOOD &
O'BRIEN,
GEORGE R. STUNTZ,

By /s/ GEORGE J. TOULOUSE, JR.,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed July 9, 1948.

[24]

American Bonding Company of Baltimore
Home Office: Baltimore, Md.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents, That we, Vernon O. Tyler, as Principal, and American Bonding Company of Baltimore, as Surety, jointly and severally acknowledge ourselves to be indebted to the above-named defendants in the sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States, to be levied on our goods and chattels, lands and tenaments, upon the following conditions:

The condition of the obligation is such, that whereas, the above-named Defendants recovered judgment on the 2nd day of March, 1948, in the amount of

And, Whereas, said Defendants have sued out a Writ of Appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit to review said judgment.

Now, Therefore, if the said plaintiff, Vernon O. Tyler, shall pay to the defendants, S. Birch & Sons Construction Co., a corporation, and Morrison-Knudsen Co., Inc., all costs and damages that may be awarded against the Plaintiff above-named on the Appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars

(\$250.00), then this obligation to be void otherwise to [25] remain in full force and effect.

Dated this 8th day of July, 1948.

VERNON O. TYLER,
By GEORGE J. TOULOUSE, JR.,
Principal.

(Seal) AMERICAN BONDING CO.
OF BALTIMORE,
By GUERTIN CARROLL,
Attorney-in-Fact.

Bond approved July 9, 1948. Allen, Hilen, Froude, DeGarmo, per Gerald DeGarmo, Attorneys for Appellees.

[Endorsed]: Filed July 9, 1948.

[26]

[Title of Court and Causes Nos. 1293-1408-1420.]

STIPULATION CONCERNING RECORD
ON APPEAL

Whereas the above-entitled actions were, pursuant to stipulation of the parties, consolidated for the purpose of trial and tried as consolidated cases before the United States District Court for the Western District of Washington, Northern Division, and by reason thereof the testimony introduced upon such trial is applicable to all three actions, and

Whereas these actions were previously appealed to the Circuit Court of Appeals for the Ninth

Circuit, bearing the numbers 11465, 11464 and 11463, respectively, and

Whereas during the pendency of said appeals the Portal-to-Portal Pay Act of 1947 was passed by the Congress of the United States, and

Whereas the United States Circuit Court of Appeals for the Ninth Circuit remanded the said cases to the United States District Court for the Western District of Washington for further proceedings to determine the applicability of the Portal-to-Portal Pay Act of 1947 to these causes of action, and

Whereas the present appeals in the above-entitled cases are from the determination of the United States District Court for the Western District of Washington with reference to the applicability of the Portal-to-Portal Pay Act of 1947 to the above-entitled actions, and

Whereas on the former appeals of these cases the transcript of the testimony introduced at the trial was printed as a part of the record on appeal in the case of *S. Birch & Sons Construction Company, a Corporation*, and *Morrison-Knudsen Company, Inc., a Corporation*, appellants, vs. *Vernon O. Tyler*, appellee, No. 11463, and such transcript of testimony was not printed in the record on appeal in the other two causes set forth in the caption herein and a copy of a stipulation was [28] printed as a part of the record on appeal in the other two causes, and by such stipulation the transcript of testimony, as printed in cause number 11463 was incorporated in and by reference made

a part of the record in causes numbered 11464 and 11465;

Now, Therefore, it is hereby stipulated by and between the parties through their attorneys of record:

That the records on the present appeals of the above-entitled causes shall embrace only matters occurring subsequent to the order of the Circuit Court of Appeals for the Ninth Circuit remanding said cases to the District Court for the further proceedings to determine the applicability of the Portal-to-Portal Pay Act of 1947; that for all matters occurring prior to said order the records on appeal in causes numbered 11463, 11464 and 11465 shall be and constitute the records in the present appeals; and

That the same procedure shall be followed in the present appeals as was followed in causes numbered 11463, 11464 and 11465, namely, the transcript of testimony introduced at the trial shall be printed as part of the record on appeal in Tyler, appellant, vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, appellees, and shall not be printed as a part of the record on appeal in Kohl vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, and Sessing vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation; that in lieu of said transcript of testimony a copy of this stipulation shall be printed in Kohl vs. S. Birch & Sons Construction Company, a corpora-

tion, and Morrison-Knudsen Company, Inc., a corporation, and in *Sessing vs. S. Birch & Sons Construction Company*, a corporation and Morrison-Knudsen Company, Inc., a [29] corporation, and the transcript of testimony as printed in *Tyler vs. S. Birch & Sons Construction Company*, a corporation, and Morrison-Knudsen Company, Inc., a corporation, shall by this reference be adopted and incorporated as a part of the record in *Kohl vs. S. Birch & Sons Construction Company*, a corporation, and Morrison-Knudsen Company, Inc., a corporation, and in *Sessing vs. S. Birch & Sons Construction Company*, a corporation, and Morrison-Knudsen Company, Inc., a corporation.

Dated at Seattle this 29th day of June, 1948.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for Appellants
Kohl & Sessing.

WETTRICK, FLOOD &
O'BRIEN,

By GEORGE E. FLOOD,
Attorneys for Appellant, Tyler.
ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Appellees.
J. CHARLES DENNIS,
Attorney for United States of
America, Intervenor.

[Title of Court and Causes Nos. 1293-1408-1420.]

STIPULATION CONCERNING ORIGINAL
EXHIBITS

It Is Hereby Stipulated by and between the above-named parties, through their undersigned counsel of record, that the Clerk transmit to the Circuit Court of Appeals of the Ninth Circuit all of the original exhibits introduced in the trial of the above-entitled cause.

WETTRICK, FLOOD &
O'BRIEN,
GEORGE R. STUNTZ,

By GEORGE J. TOULOUSE, JR.,
Attorneys for Plaintiff and
Appellant, Tyler.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendants and
Appellees.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for Plaintiffs-
Appellants Kohl & Sessing.

J. CHARLES DENNIS,
United States Attorney.

[Title of Court and Causes Nos. 1293-1408-1420.]

ORDER CONCERNING EXHIBITS
ON APPEAL

This matter having come on duly and regularly before the undersigned judge of the above entitled court upon the Stipulation of the parties hereto through their respective counsels of record, and it appearing to the court that the Stipulation is in order, now, therefore, it is by the court

Ordered that all the original exhibits introduced and admitted in evidence in the above entitled action be transmitted as a part of the record of the above entitled action on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of a transcript of said exhibits, by the Clerk of the court.

Done in open court this 9th day of July, 1948.

JOHN C. BOWEN,
District Judge.

J. CHARLES DENNIS,
United States Attorney.

Presented by:

WETTRICK, FLOOD &
O'BRIEN,

By GEORGE J. TOULOUSE, JR.

(Approved as to form and entry waived.)

[Endorsed]: Filed July 9, 1948.

[34]

In the District Court of the United States for the
Western District of Washington, Northern Division

[Title of Cause—Case No. 1408.]

[Title of Cause—Case No. 1420.]

[Title of Cause—Case No. 1293.]

No. 1186

H. A. LASSITER and W. R. MORRISON,
Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,
Appellees.

No. 1628

OWEN J. McNALLY, Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, et al. Appellees.

No. 1456

RAYMOND N. NAYLOR, Appellant,

vs.

WEST CONSTRUCTION COMPANY,
a corporation, Appellee,

THE UNITED STATES OF AMERICA,
Intervenor.

STIPULATION

Whereas, the above-entitled actions were consolidated for the purposes of trial in the District Court and all testimony and all exhibits introduced in any one of the above-entitled cases was deemed to apply equally to all of the above-entitled cases, and

Whereas, the plaintiffs in the above-mentioned cases have taken their appeals to the Circuit Court of Appeals for the Ninth Circuit,

Now, Therefore, It Is Hereby Stipulated by and between the parties, through their attorneys of rec-

ord, that all the exhibits introduced on the trial of the above-entitled actions may be sent to the appellate court in the form in which they were introduced in lieu of copies.

Dated this 9th day of July, 1948.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for plaintiff-appellants Kohl & Sessing.

WETTRICK, FLOOD &
O'BRIEN,

By GEORGE E. FLOOD,
Attorneys for plaintiff-appellant Tyler.

By /s/ GEORGE J. TOULOUSE, JR.
ZABEL, POTH & PAUL,

By FREDERICK PAUL,
Attorneys for plaintiff appellants Lassiter, Morri-
son, Naylor and Owen J. McNally.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for defendant appellees S. Birch Con-
struction Company and Morrison-Knudsen Co.,
Inc.

BOGLE, BOGLE & GATES,

By ROBERT GRAHAM,
Attorneys for defendant appellee Guy F. Atkinson,
Company.

MAURICE McMICKEN,
Attorney for defendant appellee West Construc-
tion Company.

J. CHARLES DENNIS,
Attorney for United States of America Intervenor.
By FRANK PELLEGRINI,
Assistant United States Attorney.

[Endorsed]: Filed July 12, 1948.

[37]

[Title of District Court and Cause No. 1293.]

CERTIFICATE OF CLERK OF U. S. DIS-
TRICT COURT TO TRANSCRIPT OF REC-
ORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Wash-
ington, do hereby certify that the foregoing type-
written transcript of record, consisting of pages
numbered from 1 to 37, inclusive, is a full, true
and complete copy of so much of the record, papers
and other proceedings in the above entitled cause
as is required by designation of counsel filed and
shown herein, as the same remain of record and
on file in the office of the Clerk of said District
Court at Seattle, and that the same, together with

the reporter's transcript of testimony and proceedings transmitted as a part hereof (with which testimony and proceedings there is consolidated the testimony and proceedings in our Causes No. 1186, H. A. Lassiter and W. R. Morrison vs. Guy F. Atkinson Company, No. 1408, W. L. Kohl vs. S. Birch & Sons Construction Company and Morrison-Knudsen Co., No. 1420, Arthur J. Sessing vs S. Birch & Sons Construction Company and Morrison-Knudsen Co., No. 1456, Raymond N. Naylor vs. West Construction Co., and No. 1628, Owen J. McNally vs. S. Birch & Sons Construction Company and Morrison-Knudsen Co.) constitute the record on appeal herein from the supplemental judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees for making record, certificate or return: 26 pages at 40c, \$10.40; 11 pages at 10c (copies furnished), \$1.10; Notice of Appeal, \$5.00; total \$16.50.

I hereby certify that the above amount has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 5th day of July, 1948.

(Seal)

MILLARD P. THOMAS,
Clerk.

No. 11983

United States
Court of Appeals

for the Ninth Circuit

VERNON O. TYLER,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a Corporation, and MORRISON-
KNUDSEN COMPANY, INC., a Corporation,
Appellees.

Transcript of Record

(In Two Volumes)

VOLUME II

(Pages 39 to 507)

Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

NOV 4 - 1948

No. 11983

United States
Court of Appeals
for the Ninth Circuit

VERNON O. TYLER,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY, a Corporation, and MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellees.

Transcript of Record

(In Two Volumes)

VOLUME II

(Pages 39 to 507)

Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Western District of Washington, Northern Division

No. 1186

H. A. LASSITER and W. R. MORRISON,
Plaintiffs,

vs.

GUY F. ATKINSON COMPANY, a corporation,
Defendant.

No. 1293

VERNON O. TYLER, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation,
and MORRISON-KNUDSEN CO., a corporation,
Defendants.

No. 1408

WILLIAM LESLIE KOHL, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation,
and MORRISON-KNUDSEN CO., a corporation,
Defendants.

No. 1420

ARTHUR J. SESSING, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation,
and MORRISON-KNUDSEN CO., a corporation,
Defendants.

No. 1456

RAYMOND N. NAYLOR, Plaintiff,

vs.

WEST CONSTRUCTION CO., a corporation,
Defendant.

No. 1628

OWEN J. McNALLY, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation,
and MORRISON-KNUDSEN CO.,
Defendants.

STIPULATION AND PRE-TRIAL ORDER
RE PORTAL ACT HEARING

I.

It Is Hereby Stipulated by and between the parties through their attorneys of record:

1. That the above named causes may be consolidated for purposes of hearing only those matters relating to the Portal-to-Portal Act of 1947 and in particular those matters relating to the defenses asserted by the defendants under Sections 9 and 11 of said Act, said hearing to be herein referred to as the Portal Act Hearing.

2. Defendants contend that the acts or omissions complained of in these actions and each of them were in good faith in conformity with and in reliance on administrative regulations, orders, rulings, approvals or interpretations of an agency of the United States or administrative practices or enforcement policies of an agency of the United States with respect to the class of employers to which defendants belonged and plaintiffs deny the same.

3. Defendants contend that the acts or omissions alleged as giving rise to these actions and each of them were in good faith and that the defendant had reasonable grounds for believing that the acts or omissions were not a violation of the Fair Labor Standards Act of 1938, and plaintiffs deny same.

4. Plaintiffs contend that the Portal-to-Portal Act of 1947 is unconstitutional, and in particular such sections or portions thereof which may be deemed

applicable to these causes or any of the, and defendants deny the same.

5. In part II are listed certain exhibits which may be offered in the Portal Act Hearing for these causes by the respective parties together with the stipulations pertaining to said exhibits. With reference to said exhibits and with reference to all evidence and testimony to be introduced by any party at said Portal Act Hearing it is Stipulated as follows:

(a) All evidence, documentary or oral, relating to any one of the defendants shall be deemed to relate to all of the defendants and all documents or communications sent to or received by one defendant shall be deemed to have been sent to, received by or come to the attention and within the knowledge of all other defendants. All information, knowledge, beliefs and actions of any of the defendants shall also be deemed to be the information, knowledge, beliefs and actions of all other defendants.

(b) The objections of any plaintiff as to the admissibility of any exhibit, as hereinafter reserved, or to any testimony shall be deemed the objection of all plaintiffs and the objection of any defendant as to the admissibility of any exhibit or testimony shall be deemed the objection of all other defendants.

(c) All objections to the admissibility of any exhibit listed in part II hereof save and except the objections to relevancy and materiality hereinafter noted are expressly waived by all parties, the identification and authenticity of all exhibits being ad-

mitted by all parties and it being expressly agreed that photostatic or other copies of all documents may be offered in lieu of the originals of such documents.

(d) In the event any appeal should be taken by any party to any of these causes it is Stipulated and Agreed that the original exhibits designated as a part of the record on appeal shall, subject to the approval of the court, be transmitted to the Circuit Court of Appeals and not printed in the record.

(6) It Is Stipulated that all exhibits may be offered by all parties at the outset of the Portal Act Hearing subject to such reservations and objections as to relevancy and materiality as may hereinafter be noted. It is further Agreed that the offering of oral testimony may proceed and that the Court shall reserve ruling upon the admissibility of such exhibits to which objections are made. It is understood that any testimony relating to exhibits concerning which reservation of ruling is made shall be received subject to such ruling as may be made by the Court relative to these exhibits. It is Understood and Agreed that all counsel shall hold themselves in readiness upon call of the Court following the offering of oral testimony to be of such assistance as they may by way of oral argument or otherwise as an aid to the Court in determining such reservations of ruling as may be made.

II—EXHIBITS

Part A-1—Exhibits to be offered in Defendants' Case in Chief relating to the authority for the Issuance of the Exhibits listed in Part A-2 below.

Defendants offer the following exhibits as proof that each and every one of the exhibits listed in Part A-2 hereof was an act, document or action of an agency of the United States.

Exhibit No.	Document
1. (8 Parts)	(A) Letter dated March 11, 1942.
From :	The Adjutant General, War Department, Washington, D. C.
To :	The Commanding General, Western Defense Command, San Francisco, California.
	(B) Letter Dated April 21, 1942.
From :	Headquarters Western Defense Command and Fourth Army, San Francisco, Calif.
To :	The Commanding General, Alaska Defense Command, Fort Richardson, Alaska.
	(C) Letter dated April 22, 1942.
From :	Headquarters Western Defense Command, per E. T. Adler, Captain, A.G.D., Assistant Adjutant General.
To :	Chief of Engineers, U. S. Army, Washington, D. C.
	and endorsements—
	(1) Office of the Chief of Engineers, per Chas. G. Holle, Lieut. Co., Corps of Engineers, Assistant Executive.
	(2) The Commanding General, Western Defense Command and Fourth Army per Gene A. Robens, Captain, Asst. Adjutant General.
	(3) The Division Engineer per H. J. Wild, Colonel, Corps of Engineers, Executive Assistant.

Exhibit No.	Document
1. (Cont'd)	(4) The District Engineer per Donald P. Booth, Lt. Col., Corps of Engineers, Executive Assistant.
	(D) Letter dated May 4, 1942.
From:	Headquarters Western Defense Command and Fourth Army per B. Y. Read, Colonel, Adjutant General.
To:	District Engineer, U. S. Engineers Office, Seattle, Washington.
	(E) Letter dated May 6, 1942.
From:	Office of the Chief of Engineers, Washington, D. C., per Chas. G. Holle, Lieut. Col., Corps of Engineers, Assistant Executive.
To:	The Division Engineer, North Pacific Division, Portland, Oregon. and endorsement— (1) Office of the Division Engineer per H. J. Wild, Colonel Executive Assistant.
	(F) Letter dated July 17, 1943.
From:	Headquarters Western Defense Command and Fourth Army per B. Y. Read, Colonel, Adjutant General.
To:	Commanding General, Alaska Defense Command.
Subject:	Appointment of Contracting and Certifying Officers, Alaska Military Construction.
	(G) Letter dated July 17, 1943.
From:	Headquarters Western Defense Command and Fourth Army per B. Y. Read, Colonel, Adjutant General.
To:	Commanding General, Alaska Defense Command.
Subject:	Responsibility as to Construction and Real Estate Activities.
	(H) Letter dated August 23, 1943.
From:	Headquarters Western Defense Command and Fourth Army per B. Y. Read, Colonel, Adjutant General.
To:	Commanding General, Alaska Defense Command.

Exhibit No.	Document
2.	Letter dated May 4, 1942.
From :	Headquarters Western Defense Command and Fourth Army.
To :	Officer in Charge, Alaska Construction, Anchorage, Alaska.
3.	Letter dated May 4, 1942.
From :	Headquarters Western Defense Command and Fourth Army.
To :	Commanding General, Alaska Defense Command, Fort Richardson, Alaska.
4.	(Consisting of two parts.)
	(A) Letter dated October 2, 1941.
From :	G. J. Nold, Lt. Col. Corps of Engineers.
To :	The Chief of Engineers, U. S. Army, Washington, D. C.
	and endorsement thereto by H. J. Wild, Colonel, Corps of Engineers, Executive Assistant.
	(B) Telegram dated September 5, 1941, from the Adjutant General, War Department, to Commanding General, Alaska Defense Command.
5.	War Department General Order No. 67 dated October 16, 1943.
6.	Letter dated October 27, 1943.
From :	The War Department per J. A. Ullis, Major General, The Adjutant General.
To :	The Commanding General, Alaska Department.
7.	Letter dated November 26, 1943.
From :	Headquarters Alaskan Department per S. B. Buckner, Jr., Lt. General, U. S. Army Commanding.
To :	The District Engineer, U. S. Engineers Office, Seattle, Washington.

Exhibit No.	Document
8.	Letter dated November 3, 1943.
From :	The Office of the Chief of Engineers, War Department per David H. Tulley, Colonel, Corps of Engineers, Executive Officer.
To :	The Division Engineer. and endorsements by C. L. Coray, Lt. Col., Corps of Engineers and Noble A. Bosley, Captain, Corps of Engineers.
9.	Letter dated October 5, 1944.
From :	L. B. DeLong, Colonel, Corps of Engineers, Engineer, Alaskan Department.
To :	District Engineer, U. S. Engineers Office, Seattle, Washington.
10.	War Department Circular No. 248 dated December 4 1941.
11.	War Department Circular No. 59 dated March 2, 1942.
12.	Army Regulations No. 100-70 dated November 5, 1942, and Change No. 1 dated January 26, 1943.

Part A-2—Exhibits to be offered in Defendants' Case in Chief relating to written documents relied upon by Defendants.

Defendants offer the following exhibits, subject to the stipulations hereinafter noted, in proof that the acts or omissions complained of were in good faith in conformity with and in reliance on administrative regulations, orders, rulings, approvals, or interpretations of an agency of the United States or an administrative practice or enforcement policy of any such agency with respect to the class of employers to which defendants belonged and as proof that the acts or omissions alleged as giving rise to these actions and each of them were in good faith

and that the defendants had reasonable grounds for believing that the acts or omissions were not a violation of the Fair Labor Standards Act.

Exhibit No.	Document
13	Prime Contract by and between the defendant Guy F. Atkinson Company and the United States of America dated September 30, 1943, being Contract No. W 45-108-eng-202 and Twelve supplements and modifications thereto.

It is Stipulated that each of the defendants was a party to a fixed-fee construction contract by and between the United States of America and said defendant, such contract being identical in form to Contract No. W 45-108-eng-202 by and between the United States and Guy F. Atkinson Company save as to the amount and scope of the work involved, the dates, amounts of contractor's fee and other matters agreed not to be herein material. Each such contract was also modified and amended by various supplemental and modification agreements in the form of those relating to the Guy F. Atkinson Company contract, the terms and provisions of such supplements and modifications being immaterial to the issues presented in the Portal Hearing.

Exhibit No.	Document
14	Circular Letter No. 2236 issued by the Office of the Chief of Engineers, United States War Department, dated January 9, 1943.
15	Circular Letter No. 2390 issued by The Office of the Chief of Engineers, Army Service Forces, United States War Department dated May 13, 1943.

It is Stipulated and agreed that a true and correct copy of Exhibit Nos. 14 and 15 was furnished by the District Engineer and/or the Contracting Officer to

each of the defendants prior to the negotiation of the fixed fee construction contract referred to above in the stipulation relating to Exhibit No. 13.

Exhibit No.	Document
16.	<p>Rulings of the War Department Wage Administration Agency per John R. Abersold, Chief, dated April 27, 1944, and enclosures, relating to—</p> <ul style="list-style-type: none">(a) Salary Schedule for Non-Manual Employees working in Alaska on Cost-plus-a-fixed-fee construction projects; and(b) Salary Schedule for Non-Manual Employees Performing Work in Seattle Headquarters Offices of the C.P.F.F. Architect-Engineer and Construction Contractors under the Jurisdiction of the Alaskan Department.(c) Application to Employees Temporarily Assigned to Emergency Work at La Porte, Indiana, of Salary Schedule for Non - Manual Employees of Seattle Headquarters Offices.
17.	<p>Letter dated August 27, 1942.</p> <p>From: War Department, United States Engineer Office, Seattle, Washington, per A. B. Smith, Captain, Corps of Engineers, Executive Assistant.</p> <p>To: Guy F. Atkinson Co., O'Shea Building, Seattle, Washington.</p>
18.	<p>Letter dated September 6, 1942.</p> <p>From: War Department, United States Engineers Office, Seattle, Washington, A. B. Smith, Captain, Corps of Engineers, Executive Assistant.</p> <p>To: Guy F. Atkinson Company, O'Shea Building, Seattle, Washington.</p>

Exhibit No.	Document
19.	Letter dated February 20, 1943.
From:	War Department, United States Engineer Office, Seattle, Washington, J. D. Lang, Lt. Col., Corps of Engineers, Executive Officer—Alaska Services.
To:	Guy F. Atkinson Company, 1524 Fifth Avenue, Seattle, Washington.

It Is Stipulated that a true and correct copy of War Department Circular Letter No. 2236 (Exhibit No. 14) was attached to this letter and was received.

Exhibit No.	Document
20.	War Department Memorandum, No. S5-101-43, dated June 4, 1943.
From:	War Department, Army Service Forces, Office of the Adjutant General, Washington, per J. A. Ulio, Major General, Adjutant General.
Subject:	Clearance through War Department of Requests for Rulings Affecting Labor Costs under Cost-Plus-Fixed-Fee Contracts.
21.	Letter dated June 28, 1943.
From:	War Department, United States Engineer Office, Seattle, Wn., per C. C. Templeton, Major, Corps of Engineers, Chief, Personnel Branch.
To:	Guy F. Atkinson Co., Seattle, Wn.
22.	Letter dated October 20, 1943.
From:	Guy F. Atkinson Company, Guy F. Atkinson, Chairman of the Board.
To:	The District Engineer, United States Engineers Office, 700 Central Building, Seattle, Washington.
Subject:	Field Schedule—Adak—Depot Project—Contract No. W-45-108-eng-202.
Enclosures:	(a) Field Organization Schedule—Adak Depot—Alaska Contract No. W-45-108-eng-202. (b) Guy F. Atkinson Company Field Organization Chart—Adak Depot—Alaska—No. 1002 B.

- | Exhibit No. | Document |
|-------------|--|
| 23. | Letter dated October 20, 1943. |
| From : | War Department, United States Engineering Office, Seattle, Washington, George F. Tait, Major, Corps of Engineers, Executive Officer—Alaska Services. |
| To : | Engineer, A.D.C. c/o Postmaster, Seattle, Washington. |
| Subject : | Regarding Contract with Guy F. Atkinson Company.
and 1st Indorsement dated October 24, 1943. |
| From : | Office of Engineer, A.D.C. A.P.O. 942, c/o P. M., Seattle, Washington. |
| To : | District Engineer, U. S. Engineers Office, 700 Central Building, Seattle. |
| 24. | Letter dated October 29, 1943. |
| From : | War Department, United States Engineer Office, Seattle, Wn., George F. Tait, Major, Corps of Engineers, Contracting Officer. |
| To : | Guy F. Atkinson Company, Seattle. |
| 25. | Letter dated November 5, 1943. |
| From : | George F. Tait, Major, Corps of Engineers, Contracting Officer. |
| To : | Guy F. Atkinson, Seattle. |
| Subject : | Field Organization Schedule—Adak Depot Project, Alaska Contract W-45-108-eng-202. |
| 26. | Letter dated November 15, 1943. |
| From : | Guy F. Atkinson Company, Ray H. Northcutt, Project Manager. |
| To : | The District Engineer, United States Engineers Office, 700 Central Building, Seattle, Washington. |
| Subject : | Adak Headquarters Organization Schedule. Adak Depot Project No. W-45-108-eng-202 (relating to Seattle Headquarters office personnel.) |

27. Letter dated November 30, 1943.
From: War Department, United States Engineer Office, Seattle, Wash., George F. Tait, Major, Corps of Engineers, Contracting Officer.
To: Guy F. Atkinson Company, Seattle.
Subject: Organization Schedule, Seattle Headquarters Office.
and enclosure
(a) Organization Chart, Seattle Headquarters Office.
28. Memorandum dated December 7, 1943.
From: War Department, Office of the Depot Engineers, A.P.O. 980, U. S. Army, for the Depot Engineer, R. C. Whitener, Captain, C. E. Administrative Officer.
To: Guy F. Atkinson Company, West Construction Company, Puget Sound Bridge & Dredging Co., Birch & Sons, A.P.O. 980, U. S. Army.
Subject: Overtime—(Manual Employees)
29. Letter dated January 19, 1944.
From: Guy F. Atkinson Company,
Ray H. Northcutt, Project Manager.
To: District Engineer, United States Engineer Office, Seattle, Washington.
Subject: Field Organization Schedule—Alaska.
30. Letter dated January 28, 1944.
From: Guy F. Atkinson Company,
Ray H. Northcutt, Vice-President.
To: District Engineer, United States Engineer Office, Seattle, Washington.
Subject: Field Organization Schedule—Alaska—Seattle Headquarters Office — Organization Schedule.
31. Letter dated February 2, 1944.
From: War Department, United States Engineer Office, Seattle, Washington, George F. Tait, Major, Corps of Engineers, Contracting Officer.
To: Guy F. Atkinson Co., Seattle.
Subject: Field Organization Schedule, Alaska.

- | Exhibit No. | Document |
|-------------|--|
| 32. | Letter dated February 4, 1944.
From: Guy F. Atkinson Co., Ray H. Northcutt, Project Manager.
To: Mr. Chester D. Ross, U.S.E.D., Chief, Labor Relations Section.
Subject: Treasury Department Submission — Non-Manual Organization Schedules — Contract No. W-45-108-eng.-202. |
| 33. | Letter dated February 12, 1944.
From: War Department, United States Engineer Office, Seattle, Washington, George F. Tait, Major, Corps of Engineers, Contracting Officer.
To: Birch-Morrison-Knudsen, 330 Central Bldg., Seattle, Washington.
Subject: 48 Hour Week for Seattle Office employees. |
| 34. | Letter dated February 13, 1944.
From: War Department, United States Engineer Office, Seattle, George F. Tait, Major, Corps of Engineers, Contracting Officer.
To: Birch-Morrison-Knudsen, 330 Central Bldg., Seattle, Washington.
Subject: 70 Hour Weeks for Jobsite Employees. |
| 35. | Letter dated February 23, 1944.
From: Guy F. Atkinson Co., Ray H. Northcutt, Vice-President.
To: Frank L. Mechem, Bogle, Bogle & Gates, 603 Central Building, Seattle, Wash.
Subject: Jurisdiction of Reviewing Agency—CPFF Contractor—Agents of Government Salary Stabilization—War Dept. Project—Alaska. and enclosures
(a) War Department Control—Non-Manual Salaries CPFF Contractors—Alaska
(b) SOES Examples—new employment—Reclassification—Re-rate, Mert Increase |

- | Exhibit No. | Document |
|-------------|---|
| 36. | Letter dated March 3, 1944. |
| From: | Guy F. Atkinson Co.,
Ray H. Northcutt, Project Manager. |
| To: | District Engineer, United States Engineer
Office, Seattle, Washington. |
| Subject: | Non-Manual Salary Schedules — Approval
by Governmental Reviewing Agencies. |
| 37. | Letter dated March 8, 1944. |
| From: | Guy F. Atkinson Co., S. E. Nord, Asst. Proj-
ect Manager. |
| To: | District Engineer, U. S. Engineer Office, Se-
attle, Washington. |
| Subject: | Organization Schedule for Temporary Field
Office, La Porte, Indiana.
and enclosure—
(a) Organization Chart. |
| 38. | Letter dated March 14, 1944. |
| From: | War Department, United States Engineer
Office, Seattle, Washington, George F. Tait,
Major, Corps of Engineers, Contracting Of-
ficer. |
| To: | Guy F. Atkinson Company, Seattle. |
| Subject: | Organization Schedule for Temporary Field
Office, La Porte, Indiana. |
| 39. | Letter dated March 18, 1944. |
| From: | Guy F. Atkinson Co., 202 Job Office, E. B.
Skeels, Job Manager. |
| To: | Resident Engineer, APO 980, U. S. Army. |
| Subject: | Non-Manual Employees. |
| 40. | Letter dated April 5, 1944. |
| From: | Headquarters, Alaskan Department, Office of
the Engineer, APO 942, c/o Postmaster, Se-
attle, Washington, L. B. DeLong, Colonel,
Corps of Engineers, Engineer, Construction
Division. |
| To: | Guy F. Atkinson Company, APO 980, U. S.
Army. |
| Subject: | Overtime for Non-Manuals. |

Exhibit No.	Document
41.	Letter dated April 10, 1944.
From:	District Engineer, United States Engineer Office, Seattle, Washington, George F. Tait, Major, Corps of Engineers, Chief, Alaska Division.
To:	National War Labor Board, Region XII, 1411 Fourth Avenue Building, Seattle.
42.	Letter dated April 20, 1944 (Supplemental transmittal letter)
From:	John I. Noble, Engineer (structural) Authorized Representative of the Contracting Officer.
	and
	Transmittal letter dated April 12, 1944.
From:	War Department, United States Engineer Office, Seattle, Wash.
To:	Chief, Base Echelon, Alaskan Department, 1331 3rd Avenue Building, Seattle, Washington.
Subject:	Approval of Salary Ranges of Non-Manual Employees of Cost-Plus-a-Fixed-Fee Contractors Engaged in Construction of Military Facilities for the Alaskan Department, U. S. Army
	and enclosures—
	(a) Job Descriptions Non-Manual Employees CPFF Principal and Subcontractors.
	(b) Non-Manual Salary Schedules, Alaska, with Supplement Entitled "Background and Explanation."
	(c) Field Organization Chart, Guy F. Atkinson Company.
	(d) Field Organization Chart, West Construction Company.
	(e) Field Organization Chart, Birch-Morrison-Knudsen, 3 parts.
	(f) Field organization chart, Inland Construction Company, 2 parts.
	(g) Field Organization Chart, Puget Sound-Macco Construction Co.

Exhibit No.	Document
42. (Cont'd)	(h) Non-Manual Schedules for Seattle and Continental U. S. with Supplement entitled "Background and Explanation." (i) Seattle Headquarters, Organization Chart, Guy F. Atkinson. (j) Seattle Headquarters, Organization Chart, West Construction Co. (k) Seattle Headquarters Organization Chart, Birch-Morrison-Knudsen. (l) Seattle Headquarters Organization Chart, Puget Sound—Macco Construction Co.
43.	Letter dated May 3, 1944.
From:	War Department, United States Engineer Office, Seattle, Washington, J. I. Noble, Contracting Officer.
To:	Guy F. Atkinson Co., Seattle, Washington.
Subject:	Transmittal of Abersold rulings.

It is Stipulated that a true and correct copy of the rulings of the War Department Wage Administration Agency dated April 27, 1944, being Exhibit 16 herein, was attached to this letter and was received.

Exhibit No.	Document
44.	Letter dated May 5, 1944.
From:	Headquarters, Alaskan Department, Office of the Engineer, APO 942, c/o Postmaster, Seattle, Washington. E. H. Elwin, Captain, Corps of Engineers, Executive Officer, Construction Division.
To:	Resident Engineer, APO 980, U. S. Army.
Subject:	Preparation of Payrolls.
45.	Memorandum dated May 18, 1944.
By:	J. I. Noble.
Subject:	Schedule of Recommended Base Hiring Rates for Non-Manual Employees at Alaska Jobsite and Supporting Offices in Mainland Alaska Towns for CPFF Contracting.

- | Exhibit No. | Document |
|-------------|--|
| 46. | Letter dated May 20, 1944.
Post Headquarters, Office of the Resident Engineer, APO 729, U. S. Army, D. A. Griffith, Chief Project Auditor. |
| To: | All contractors. |
| Subject: | Preparation of Payrolls.
and enclosures:
Letter dated May 5, 1944. |
| From: | Headquarters, Alaskan Dept., Office of the Engineer, APO 942, c/o Postmaster, Seattle, E. H. Elwin, Captain, Corps of Engineers, Executive Officer, Construction Division. |
| To: | Resident Engineer, APO 729, U. S. Army. |
| Subject: | Preparation of Payrolls. |
| 47. | Letter dated June 3, 1944. |
| From: | War Department, United States Engineer Office, Seattle, Wn., E. H. Rausch, Jr., Major, Corps of Engineers, Chief, Alaska Division. |
| To: | Engineer, Alaskan Department, APO 942, c/o Postmaster, Seattle, Wn. |
| Subject: | Transmittal of approved wage structure for non-manual employees of Cost-Plus-a-Fixed Fee contractors in Alaska. |
| 48. | Letter dated June 10, 1944. |
| From: | Post Headquarters, Office of the Resident Engineer, APO 980, c/o Postmaster, Seattle, J. M. McGreevy, Colonel, Corps of Engineers, Contracting Officer. |
| To: | CPFF Contractors, this station. |
| Subject: | Salary Schedule for non-manual employees working in Alaska on CPFF construction project. |
| 49. | Letter dated June 15, 1944. |
| From: | War Department, United States Engineer Office, Seattle, Wn., E. H. Rausch, Jr., Major, Corps of Engineers, Chief, Alaska Division. |
| To: | Commanding General, Headquarters Alaskan Department, APO 942, c/o Postmaster, Seattle, Washington. |

Exhibit No.	Document
49. (Cont'd)	Correction of Designations on Old Payrolls, and 1st Indorsement dated July 21, 1944—
Subject:	
From:	Office of the Engineer, Alaskan Department, APO 942, c/o Postmaster, Seattle, Edward Stone, Major, Corps of Engineers, OIC, Administrative Branch, Construction Division.
To:	District Engineer, U. S. Engineer Office, Seattle.
50.	Letter dated June 18, 1944.
From:	Headquarters, Office of the Commanding General, APO 942, c/o Postmaster, Seattle, Wn., Frank L. Whittaker, Brigadier General, U. S. Army, Deputy Commander, by Leo J. Ohman, Major, A.G.D. Asst. Adjutant General.
To:	Command General, APO, 980, U. S. Army. Command General, APO 986, U. S. Army. Command General, APO 726, U. S. Army. Command General, APO 729, U. S. Army. District Engineer, U. S. Engineer Office, Seattle, Wn., Chief, Base Echelon, Alaskan Dept., Seattle, Wn.
Subject:	Salary Schedule for Non-Manual Employees working in Alaska on Cost-Plus-a-Fixed-Fee Construction Projects.

It is Stipulated that a true and correct copy of the rulings of the War Department Wage Administration Agency dated April 27, 1944, being Exhibit 16 herein, was attached to this letter and that a copy of this Exhibit 50 was received by the defendants.

Exhibit No.	Document
51.	Letter dated July 7, 1944.
From:	District Engineer, United States Engineer Office, Seattle, Wn., E. H. Rausch, Jr., Major, Corps of Engineers, Chief, Alaska Division.
To:	Engineer, Alaskan Department, APO 942, c/o Postmaster, U. S. Army.

- | Exhibit No. | Document |
|--------------|--|
| 51. (Cont'd) | Approval of wage rates for contractors' non-manual employees. |
| Subject: | and enclosure
(a) Base Rate Schedule. |
| 52. | Letter of July 25, 1944. |
| From: | War Department, United States Engineer Office, Seattle, Wn., J. M. Wild, Lt. Col., Corps of Engineers, Acting District Engineer. |
| Through: | Chief, Headquarters Base Echelon, Alaskan Department, Seattle, Wn. |
| To: | War Department Wage Administration Agency, Pentagon Building, Washington, D. C. |
| Subject: | Salary Adjustments of Contractors' Non-Manual Employees.
and 3 Indorsements. |
| 53. | Letter dated August 21, 1944. |
| From: | District Engineer, United States Engineer Office, Seattle, Wn., D. A. Date, Contracting Officer. |
| To: | Guy F. Atkinson Company, Seattle, Wn. |
| Subject: | Revised Uniform Contract of Employment.
and enclosures:
(a) Non-Manual Uniform Contract of Employment. |

It is Stipulated that there was attached to this letter a form of Manual Uniform Contract of Employment not here included and stipulated not to be material herein.

- | Exhibit No. | Document |
|-------------|---|
| 54. | Letter dated October 13, 1944. |
| From: | War Department, U. S. Engineer Office, Seattle, Wn., Douglas M. Pelton, Captain, Corps of Engineers, Contracting Officer. |
| To: | Guy F. Atkinson Company, Seattle, Wn. |
| Subject: | Revised Uniform Agreement of Employment, Second Revision.
and enclosures:
(a) Non-Manual Uniform Agreement of Employment. |

It is Stipulated that there was attached to this letter a form of Manual Uniform Contract of Employment not here included and stipulated not to be material herein.

Exhibit No.	Document
55.	Letter dated November 15, 1944.
From :	War Department, Alaskan Department, F. G. Erie, Lt. Col., Corps of Engineers, Acting District Engineer, Representative of the Alaskan Department.
To :	Headquarters, Army Service Forces, Industrial Personnel Division, Labor Branch, Washington, D. C.
Subject :	Overtime for Employee of S. Birch & Sons Construction Company and Morrison-Knudsen Company, Inc. and Enclosures :
	(a) Letter dated September 21, 1944.
From :	George A. Parks, Omaha, Neb.
To :	Senator Kenneth Wherry, U. S. Senate, Washington, D. C.
	(b) Letter dated September 30, 1944.
From :	U. S. Department of Labor, Wage & Hour Division, Washington, D. C., L. Metcalf Walling, Administrator.
To :	Honorable Kenneth S. Wherry, U. S. Senate, Washington, D. C.
	(c) Letter dated October 2, 1944.
From :	Kenneth S. Wherry, U. S. Senate, Washington, D. C.
To :	Col. John B. Hughes, Engineer, Army Ground Forces, Pentagon Building, Washington, D. C.
	(d) Letter dated October 7, 1944.
From :	War Department, Office of Chief of Engineers, Washington, D. C., William A. Mowery, Major, Corps of Engineers, Chief, Labor Relations, Industrial Personnel Branch.
	(e) Endorsement dated October 12, 1944.
From :	William J. Brennan, Jr., Colonel, General Staff Corps, Chief, Labor Branch, Industrial Personnel Division, Washington, D. C.

- | Exhibit No. | Document |
|--------------|--|
| 55. (Cont'd) | Commanding General, Alaskan Department, Seattle, Wn. |
| To: | (f) Endorsement dated October 17, 1944. |
| From: | Colonel, QMC, Chief, Base Echelon, by Captain Norris B. Gough, A.G.D., Ass't Adj. Gen'l; Thur: Dist. Engineer, U. S. Engineer Department, Seattle, for forwarding to Commanding General for reply. |
| 56. | Letter dated November 25, 1944. |
| From: | Headquarters, Alaskan Department, Office of the Engineer, APO 942, c/o Postmaster, Seattle, Wn., J. D. Lang, Lt. Col., Corps of Engineers, Engineer, Contracting Officer. |
| To: | Guy F. Atkinson Company, Seattle. |
| 57. | Letter dated December 8, 1944. |
| From: | War Department, United States Engineer Office, Seattle, Wn., J. I. Noble, Contracting Officer. |
| To: | Guy F. Atkinson Company, Seattle. |
| Subject: | Litigation Procedure. |
| 58. | Radiogram dated January 31, 1945. |
| From: | Robins, Acting OCE, Washington, D. C. |
| To: | Seattle Engineer, District, Seattle, Wn. |
| 59. | Letter dated February 7, 1945. |
| From: | War Department, United States Engineer Office, Seattle, Washington, D. M. Pelton, Captain, Corps of Engineers, Contracting Officer. |
| To: | Guy F. Atkinson Company, Seattle, Wn. |
| Subject: | Claims for Additional Compensation Under Fair Labor Standards Act. |
| 60. | Letter dated February 14, 1945. |
| From: | War Department, United States Engineer Office, Seattle, Wn., D. M. Pelton, Captain, Corps of Engineers, Contracting Officer. |
| To: | Guy F. Atkinson Company, Seattle, Wn. |
| Subject: | Comparative Summary of Employment Agreement provisions. |
| | and enclosure: |
| | (a) Page 8 of Comparative Summary—Non-Manual. |

It is Stipulated that there was attached to this letter a "Comparative Summary Employment Agreement Provisions Cost-Plus-a-Fixed-Fee Contractors Alaskan Department—Manual Employees" consisting of eleven pages and a "Comparative Summary Employment Agreement Provisions Cost-Plus-a-Fixed-Fee Contractors Alaskan Department—Non-Manual Employees" consisting of twelve pages, which were received by the defendants all pages of which except page 8 of the Non-Manual Employees Comparative Summary are not here included and are agreed to be not material herein.

Exhibit No.	Document
61.	Letter dated February 16, 1945.
From :	War Department, United States Engineer Office, Seattle, Wn., D. M. Pelton, Captain, Corps of Engineers, Contracting Officer.
To :	Guy F. Atkinson Company, Seattle, Wn.
Subject :	Regulations Governing Stabilization of Non-Manual Wages. and enclosure : (a) Letter dated January 15, 1945, from War Department, Office of the Division Engineer, Pacific Division, T. E. Burke, Captain, Corps of Engineers, Chief, Labor Relations Branch,— Subject : Policy and Procedures under Wage Stabilization Applicable to Fixed-Fee Contracts.
62.	Letter dated February 22, 1945.
From :	War Department, United States Engineer Office, Seattle, D. M. Pelton, Captain, Corps of Engineers, Contracting Officer.
To :	Birch-Morrison-Knudsen, 404 Central Bldg., Seattle, Wn.
Subject :	Procedure for Processing Claims Submitted by Contractors' Employees.

- | Exhibit No. | Document |
|-------------|--|
| 63. | Letter dated February 26, 1945. |
| From : | War Department, United States Engineer Office, Seattle, Wn., D. M. Pelton, Captain, Corps of Engineers, Contracting Officer. |
| To : | Mr. W. R. Morrison, Chairman, Employee's Committee, Guy F. Atkinson Company, Seattle, Wn. |
| Subject : | Denial of Employee Claims. |
| 64. | Letter dated February 28, 1945. |
| From : | W. R. Morrison, Chairman, Employees Committee. |
| To : | Guy F. Atkinson Company, Seattle, Wn. |
| 65. | Letter dated April 5, 1945. |
| From : | War Department, United States Engineer Office, Seattle, J. I. Noble, Contracting Officer. |
| To : | Birch - Morrison - Knudsen Company, 404 Central Building, Seattle, Wn. |
| Subject : | Litigation Procedure. |
| 66. | Letter dated June 6, 1945. |
| From : | War Department, Office of the District Engineer, Seattle, Wn., E. C. Carlson, Contracting Officer. |
| To : | Guy F. Atkinson Company, Seattle, Wn. |
| Subject : | Modification of Non-Manual Uniform Agreement of Employment. |
| 67. | Letter dated August 14, 1945. |
| From : | War Department, Office of the District Engineer, Seattle, Wn., E. C. Carlson, Contracting Officer. |
| To : | Birch-Morrison-Knudsen, 713 Central Bldg., Seattle, Wn. |
| Subject : | Wage Increases on Adjustments—Jobsite employees. |

It is Further Stipulated that each of the exhibits listed above in Part A-2 hereof which is addressed to any one of the defendants was in substantially identical form addressed to and was received by each

of the defendants; and with respect to the remaining exhibits listed above in Part A-2 hereof that on or about the date of said exhibits either copies of said exhibits were furnished to each of the defendants or the information contained in said exhibits was furnished to each of the defendants:

It is understood that the provisions of the paragraph shall not be deemed to limit the scope of paragraph 5 (a) of division I of this stipulation.

With reference to each of the foregoing exhibits listed above in this Part A-2 hereof it is Stipulated that the person signing, issuing or promulgating said document did so in the capacity indicated on said document and that he had the capacity indicated.

Part B—Objections of Plaintiffs to Defendants' Exhibits Listed in Part A-1 and Part A-2 Above.

General Objections:

1. Plaintiffs specifically save and preserve all challenges and objections to defendants' pleadings, proof and evidence based upon questions of constitutionality and unconstitutionality.

2. The plaintiffs object to any and all documents listed in Part A-1 and Part A-2 listed above on the ground that the same are correspondence between contracting parties, to-wit: The War Department and the defendants; and that any and all wage and hour demands disclosed by said documents, made by the War Department, are merely the demands of one contracting party, the promisee (War Department), upon the defendants as the promisor under the prime contracts between War Department and the defendants, being Exhibit 13 herein.

3. The plaintiffs object to the admission of all the documents offered by the defendants except such portions of defendants' exhibits as may correspond to War Department Contract Form 3, on the ground that none of said documents has been published in the Federal Register as an order, regulation, rule, license or notice issued, prescribed, or promulgated by a Federal agency, and therefore none of said documents can be deemed to be an administrative regulation, order, ruling, approval or interpretation of any agency of the United States or evidence of any administrative practice or enforcement policy of any such agency, but on the contrary, the said documents merely constitute a portion of the correspondence between two contracting parties.

Specific Objections:

The plaintiffs object to the admission of the following documents in Part A-2 above of this stipulation, upon the ground that these documents are irrelevant and immaterial in that they do not relate to the act or omission complained of in these actions, to-wit: 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38, 44, 45, 46, 47, 50, 51, 52, 54, 55, 56, 60, 61, 62, 66, 67.

The plaintiffs object to Circular Letter 2236 and 2390, being Exhibits 14 and 15, on the ground that they were known to the District Engineer's Office and Contracting Officer and defendants to be invalid and illegal rulings, regulations, orders, approvals or interpretations of an administrative agency of the United States.

Plaintiffs object to Exhibit 16, the Abersold Di-

rective, on the ground that Executive Order 9017, 1 C.F.R. Cum. Supp. 1075, following 50 U.S.C.A. App. §1507, Executive Order 9250, 1 C.F.R. Cum. Supp. 1213 following 50 U.S.C.A. App. §901, and the Stabilization Act of 1942, Act of October 2, 1942, 56 Stat. 765, ch. 578, 50 U.S.C.A. App. §961, forbade the National War Labor Board or any of its agencies to do any act inconsistent with the Fair Labor Standards Act.

The plaintiffs object to Exhibit 55 on the ground that it has no probative value in that the nature of the defendants' construction work and the nature of the duties of the employees were not described either to the Honorable Kenneth B. Wherry or to the Administrator of the Wage & Hour Division or to the officers of the War Department referred to in said Exhibit.

It is Stipulated that in addition to the objections noted in this Part B to the defendants' exhibits listed in Part A-1 and Part A-2 above the plaintiffs may specify further objections to said exhibits prior to the time at which the defendants shall rest their case in chief at the Portal Hearing.

Part C.—Exhibits to be Offered by Plaintiffs.

Plaintiffs offer the following exhibits in proof of their contentions that the acts or omissions of the defendants complained of in these actions and each of them were not in good faith in conformity with and in reliance on administrative regulations, orders, rulings, approvals, interpretations, administrative practices or enforcement policies of an agency of the United States.

Exhibit No.	Document
68.	Letter dated May 9, 1941.
From :	Philip B. Fleming, Ad'mr, Wage & Hour Division.
To :	Chief, Ordnance Dept., War Department.
69.	Letter dated February 19, 1943.
From :	L. Metcalf Walling, Administrator, Wage & Hour Division, United States Department of Labor.
To :	Hon. Frank Knox, Secretary of the Navy.
70.	Letter dated March 1, 1943.
From :	L. Metcalf Walling, Administrator, Wage & Hour Division, United States Department of Labor.
To :	Hon. Frank Knox, Secretary of the Navy.
71.	Release No. 11,552 issued by the Wage & Hour Division, United States Department of Labor.
72.	Letter dated May 4, 1944.
From :	Guy F. Atkinson Company.
To :	The Wage & Hour Division, United States Department of Labor, Seattle, Wn.
73.	Letter dated September 19, 1944.
From :	Walter T. Neubert, Branch Manager, Wage & Hour Division, United States Department of Labor.
To :	Ray H. Northeutt, Project Manager, Guy F. Atkinson Company, Seattle, Washington.

Defendants object to the offer of exhibits numbered 68, 69, 70 and 71 on the grounds that the same are not relevant or material to any issue presented at the Portal Hearing and for the further reason that none of said documents were addressed to, received by or ever came to the attention of the defendants or any of them.

Defendants object to the offer of Exhibits No. 72 for the reason that said exhibit is not material or

relevant to any issue presented at the Portal Hearing.

Defendants object to the offer of Exhibit No. 73 for the reason that the same is not an administrative regulation, order, ruling, interpretation, administrative practice or enforcement policy of an agency of the United States.

It is Stipulated that in addition to the objections noted in this Part C to the plaintiffs' exhibits listed hereinabove the defendants may specify further objections to said exhibits prior to the time at which the plaintiffs shall rest their defense to the defendants' case in chief at the Portal Hearing.

It is Stipulated that the Honorable Lewis B. Schwollenbach, Secretary of Labor, has certified that Exhibits 68, 69, 70 and 71 are full, true and correct copies of documents contained in the files of the Wage & Hour Division, Department of Labor, Washington, D. C.; and that the Honorable James V. Forrestal, Secretary of Navy, has certified that Exhibits 69 and 70 are full, true and correct copies of documents contained in the files of the U. S. Navy Department, Washington, D. C.

Part D.—Exhibits to be Offered by Defendants in Rebuttal.

In the event that plaintiffs' exhibit numbered 72 and 73 listed above in Part C be admitted in evidence as a part of the defense of the plaintiffs, the defendants offer the following exhibits in rebuttal, to which plaintiffs reserve the same objections as hereinabove in Part B set forth as pertaining to Part A-1 and Part A-2.

- | Exhibit No. | Document |
|-------------|--|
| 74. | Letter dated December 23, 1943. |
| From : | Guy F. Atkinson Company, per Ray H. Northcutt, Project Manager. |
| To : | District Engineer, United States Engineer Office, Seattle, Washington.
and enclosures—
(a) Letter dated December 20, 1943. |
| From : | Twelfth Regional War Labor Board, per Harold A. Seering, Regional Attorney. |
| To : | Guy F. Atkinson Co., Seattle.
(b) Letter dated December 22, 1943. |
| From : | Guy F. Atkinson Company, per Ray H. Northcutt, Project Manager. |
| To : | National War Labor Board, Region XII, Seattle, Washington. |
| 75. | Letter dated April 13, 1944. |
| From : | War Department, U. S. Engineer Office, Seattle, per George F. Tait, Major, Corps of Engineers, Contracting Officer. |
| To : | Guy F. Atkinson Company, Seattle, Wn. |
| 76. | Letter dated September 21, 1944. |
| From : | Guy F. Atkinson Company, per S. E. Nord, Business Manager. |
| To : | District Engineer, United States Engineer Office, Seattle, Washington. |
| 77. | Letter dated September 21, 1944. |
| From : | Guy F. Atkinson Company, per S. E. Nord, Business Manager. |
| To : | U. S. Department of Labor, Wage & Hour & Public Contracts Division, 305 Post Office Building, Seattle, Washington. |
| 78. | Letter dated October 3, 1944. |
| From : | War Department, United States Engineer Office, Seattle, Wn., per J. I. Noble, Contracting Officer. |
| To : | Guy F. Atkinson Company, Seattle, Wn. |

In addition to the foregoing exhibits, defendants are reserved the right to offer without objection of

plaintiffs as to the identification or authenticity of said documents the following exhibit.

Exhibit No.	Document
79.	Letter dated November 15, 1945.
From :	District Engineer, United States Engineer Office, Seattle, Wn., J. I. Noble, Contracting Officer.
To :	Guy F. Atkinson Company, Seattle, Washington.
	and enclosures
	(a) Letter dated November 9, 1945.
	From: War Department, Office of the Chief of Engineers, Washington, D. C., O. P. Easterwood, Jr., Lt. Col., C. of E., Acting Chief, Legal Division.
	To: District Engineer, U. S. Engineer Office, Seattle, Washington.
	(b) Memorandum dated November 7, 1945.
	From: Headquarters, Army Service Forces, Office of the Judge Advocate General, Washington 25, D. C., Herbert D. Hoover, Colonel, J.A.G.D.. Asst. Judge Advocate General.
	To: Chief of Engineers.
	and enclosures—
	(1) Memorandum of Agreement on Procedure for Handling Fair Labor Standards Act Claims against CPFF contractors.

It is Stipulated that plaintiffs' objections, if any, as to the admissability of the exhibits listed in this Part D shall be specified prior to the time at which defendants shall rest their rebuttal at the Portal Act Hearing.

Part E.—Additional Exhibits to be included in Defendants' Exhibits listed in Part A-1 above.

In addition to the exhibits listed in Part A-1 above, defendants offer as a part of their case in chief the following exhibits as proof that each of the exhibits listed in Part A-2 above was an act, document or

action of an agency of the United States. Said exhibits are subject to the same stipulations as hereinabove provided for the exhibits listed in Part A-1 above, it being expressly agreed that the authority conferred upon the individuals referred to in the following exhibits extends and relates to the actions and activities of all defendants at all times material herein under all contracts referred to in the stipulation relating to Exhibits 13 in Part A-2 above.

Exhibit No.	Document
80.	(a) Letter dated March 24, 1943.
From :	War Department, United States Engineer Office, Alaska Area, Anchorage, Alaska, per B. B. Talley, Col., Corps of Engineers, Officer in Charge.
To :	C. C. Templeton, Major, Corps of Engineers, U. S. Engineers Office, Seattle, Wn.
Subject :	Designation of Contracting Officer.
	(b) Letter dated September 30, 1943.
From :	Headquarters Alaska Defense Command, Office of the Engineer, APO 942, c/o Postmaster, Seattle, Washington, per G. J. Nold, Brigadier General, AUS, Engineer.
To :	Charles F. Baish, Colonel, C. E. Executive, Construction Division.
Subject :	Designation as Contracting Officer.
	(c) Letter dated October 1, 1943.
From :	Headquarters Alaska Defense Command, Office of the Engineer, c/o Postmaster, Seattle, Wash., per G. J. Nold, Colonel, Corps of Engineers, Engineer.
To :	George F. Tait, Major, Corps of Engineers, U. S. Engineer Office, 700 Central Bldg., Seattle 4, Washington.
Subject :	Designation as Contract Officer.
	(d) Letter dated October 1, 1943.
From :	Headquarters Alaska Defense Command, Office of the Engineer, c/o Postmaster, Seattle, Washington, per G. J. Nold, Colonel, Corps of Engineers, Engineer.

Exhibit No.	Document
80. (Cont'd)	J. I. Noble, Engineer, (Structural), U. S. Engineer Office, 700 Central Building, Seattle 4, Washington.
To:	
Subject:	Designation as Contracting Officer.
	(e) Letter of November 1, 1943.
From:	Headquarters Alaskan Department, Office of the Commanding General APO 942, c/o Postmaster, Seattle, Washington, per S. B. Buckner, Jr., Lt. General, U. S. Army Commanding.
To:	Brigadier General, G. J. Nold, Engineer, Alaskan Department.
Subject:	Appointment of Contracting and Certifying Officers, Alaska Military Construction.
	(f) Letter of November 2, 1943.
From:	Headquarters Alaskan Department, Office of the Engineer, APO 942, c/o Postmaster, Seattle, Wn., per G. J. Nold, Brigadier General, U. S. Army, Engineer.
To:	R. C. Whitener, Captain, C. E. c/o Resident Engineer, DEPOT, APO 980, U. S. Army.
Subject:	Designation as Contracting Officer.
	(g) Letter of February 7, 1944.
From:	Headquarters Alaskan Department, Office of the Engineer, APO 942, c/o Postmaster, Seattle, Washington, per G. J. Nold, Brigadier General, U. S. Army, Engineer, Alaskan Department.
To:	J. M. McGreevy, Lt. Col., G.E. Executive Officer, APO 980, United States Army.
Subject:	Designation as Contracting Officer.
	(h) Letter of February 9, 1944.
From:	Headquarters Alaskan Department, Office of the Engineer, APO 942, c/o Postmaster, Seattle, Washington, per G. J. Nold, Brigadier General, U. S. Army, Engineer, Alaskan Department.
To:	E. H. Elwin, Captain, Corps of Engineers, Executive Assistant, Construction Division.
Subject:	Designation as Contracting Officer.
	(i) Letter of April 10, 1944.
From:	Headquarters Alaskan Department, Office of the Engineer, APO 942, c/o Postmaster, Se-

Exhibit No.	Document
80. (Cont'd)	attle, Washington, per G. J. Nold, Brigadier General, U. S. Army, Engineer, Alaskan Department.
To:	D. A. Date, Engineer, (Electrical), U. S. Engineer Office, 1400 Textile Tower, Seattle 1, Washington.
Subject:	Designation as Contracting Officer.
	(j) Letter dated April 25, 1944.
From:	Headquarters Alaskan Department, Office of the Engineer, APO 942, c/o Postmaster, Seattle, Washington, per G. J. Nold, Brigadier General, U. S. Army, Engineer, Alaskan Department.
To:	E. H. Rausch, Jr., Major, Corps of Engineers, U. S. Engineer Office, 1400 Textile Tower, Seattle 1, Washington.
Subject:	Designation as Contracting Officer.
	(k) Letter dated June 27, 1944.
From:	Headquarters Alaskan Department, Office of the Commanding Officer, APO 942, c/o Postmaster, Seattle, Washington, per Frank L. Whittaker, Brigadier General, U. S. Army, Deputy Commander.
To:	Brigadier General G. J. Nold, Engineer, Alaskan Department.
Subject:	Appointment of Contracting and Certifying Officers, Alaska Military Constructions.
	(l) Letter dated June 27, 1944.
From:	Headquarters Alaskan Department, Office of the Commanding General, APO 942, c/o Postmaster, Seattle, Washington, per Frank L. Whittaker, Brigadier General, U. S. Army, Deputy Commander.
To:	Colonel Leon B. DeLong, Engineer, Alaskan Department.
Subject:	Appointment of Contracting and Certifying Officers, Alaska Military Construction.
	(m) Letter dated September 12, 1944.
From:	Headquarters Alaskan Department, Office of the Engineer, APO 942, c/o Postmaster, Seattle, Washington, per L. B. DeLong, Colonel, Corps of Engineers. Engineer, Alaskan Department.

Exhibit No.	Document
80. (Cont'd)	Douglas M. Pelton, Captain, Corps of Engineers, U. S. Engineer Office, 1400 Textile Tower, Seattle 1, Washington.
Subject:	Designation as Contracting Officer.
	(n) Letter dated November 9, 1944.
From:	Headquarters Alaskan Department, Office of the Commanding General, APO 942, c/o Postmaster, Seattle, Washington, per Wallace C. Philoon, Brigadier General, U. S. Army, Deputy Commander.
To:	Lt. Col. J. D. Lang, Engineer, Alaskan Department.
Subject:	Appointment of Contracting and Certifying Officers, Alaska Military Construction.
	(o) Letter of November 14, 1944.
From:	Headquarters Alaskan Department, Office of the Engineer, APO 942, c/o Postmaster, Seattle, Washington, per J. D. Lang, Lt. Col., Corps of Engineers, Engineer, Contracting Officer.
To:	Major Edward Stone, Headquarters, Alaskan Department, Office of the Engineer, APO 942, Seattle, Washington.
Subject:	Designation and Revocation of Contracting Officer's authority.
	(p) Letter dated May 23, 1945.
From:	Headquarters Alaskan Department, Office of the Engineer, APO 942, c/o Postmaster, Seattle, Washington, per J. D. Lang, Colonel, C. E., Engineer, Contracting Officer.
To:	Mr. Elmer C. Carlson, Assistant Chief, Alaskan Division, U. S. Engineer Office, 1400 Textile Tower, Seattle 1, Washington.
Subject:	Designation as Contracting Officer.

Dated this 5th day of December, 1947.

BOGLE, BOGLE & GATES,

/s/ ROBERT W. GRAHAM,

Attorneys for Defendant Guy F. Atkinson Co. in
Cause No. 1186.

ALLEN, HILEN, FROUDE &
DeGARMO,

/s/ GERALD DeGARMO,

Attorneys for Defendants S. Birch & Sons Construc-
tion Co., a corporation, and Morrison-Knudsen
Co., a corporation, Cause Nos. 1293, 1408, 1420,
1628.

/s/ MAURICE R. McMICKEN,

Attorney for Defendant West Construction Co., a
corporation, Cause No. 1456.

ZABEL, POTH & PAUL,

/s/ FREDERICK PAUL,

Attorney for Plaintiffs in Cause Nos. 1186, 1456, 1628

WETTRICK, FLOOD &

O'BRIEN,

/s/ GEORGE J. TOULOUSE, JR.,

Attorneys for Plaintiffs in Cause No. 1293.

McMICKEN, RUPP &

• SCHWEPPE,

/s/ MARY ELLEN KRUG,

Attorneys for Plaintiffs in Cause Nos. 1408, 1420.

ORDER

It is hereby Ordered that the terms and conditions embodied in the foregoing stipulation of counsel are hereby approved and the same shall be and hereby are, established to be the terms and conditions of the Portal Act Hearing on the above causes as defined in the foregoing stipulation.

Done in Open Court this 8th day of December, 1947.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

/s/ ROBERT GRAHAM,
Of Bogle, Bogle & Gates.

[Endorsed] Filed Dec. 8, 1947.

In the District Court of the United States for the
Western District of Washington, Northern Division

No. 1186

H. A. LASSITER and W. R. MORRISON,
Plaintiffs,

vs.

GUY F. ATKINSON COMPANY, a
corporation, Defendant.

No. 1293

VERNON O. TYLER, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a cor-
poration, and MORRISON-KNUDSEN CO., a
corporation, Defendants.

No. 1408

WILLIAM LESLIE KOHL, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a cor-
poration, and MORRISON-KNUDSEN CO., a
corporation, Defendants.

No. 1420

ARTHUR J. SESSING, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a cor-
poration, and MORRISON-KNUDSEN CO., a
corporation, Defendants.

No. 1456

RAYMOND N. NAYLOR, Plaintiff,

vs.

WEST CONSTRUCTION CO., a
corporation, Defendant.

No. 1628

OWEN J. McNALLY, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a cor-
poration, and MORRISON-KNUDSEN CO.,
Defendants.

UNITED STATES OF AMERICA,
Intervenor.

TRANSCRIPT OF PROCEEDINGS RE
PORTAL ACT HEARING

Before: The Honorable John C. Bowen, District
Judge.

Appearances:

Frederick Paul, Esq. (Messrs. Zabel, Paul & Paul), appearing on behalf of Plaintiffs in Cause Nos. 1186, 1456, and 1628.

George E. Flood, Esq., and George J. Toulouse, Jr., Esq. (Messrs. Wettrick, Flood & O'Brien), and George R. Stuntz, Esq. (Messrs. Stuntz & Hicks), appearing on behalf of Plaintiffs in Cause No. 1293.

Mary Ellen Krug (Messrs. McMicken, Rupp & Schweppe), appearing on behalf of Plaintiffs in Cause Nos. 1408, and 1420.

Robert W. Graham, Esq. (Messrs. Bogle, Bogle & Gates), appearing on behalf of Defendant Guy F. Atkinson Co., in Cause Number 1186.

Gerald DeGarmo, Esq. (Messrs. Allen, Hilen, Froude & DeGarmo), appearing on behalf of Defendants S. Birch & Sons Construction Co., a corporation, and Morrison-Knudsen Co., a corporation, in Cause Nos. 1293, 1408, 1420, and 1628.

Maurice R. McMicken, Esq., appearing on behalf of Defendant [3] West Construction Company, a corporation, in Cause Number 1456.

Seattle, Washington

December 8, 1947, 2:00 o'clock, p.m.

(All parties present before the Court.)

* * * * *

[4]

Mr. Graham: I neglected to mention what I may say is one important consideration provided herein, namely, the agreement and understanding of all parties that all testimony whether documentary or oral shall be deemed to relate to all of the defendants. In [10] other words, if any witness takes the stand and gives testimony, irrespective of whether he be an officer of one defendant or the other, that his testimony shall be deemed to relate to all of the defendants; in other words, all of the evidence, all of the testimony, all of the exhibits to be here introduced in evidence are deemed to be applicable to all defendants.

* * * *

[11]

The Court: There is one other thing I would like to inquire concerning, if this is an appropriate time for it.

What is the attitude and wish of all of those [17] present respecting the consolidation of these causes for trial?

Mr. Graham: There are a great many terms embodied in this order. It has been stipulated that for the purposes of the portal to portal act hearing, the cases shall be deemed to be consolidated for those purposes only.

The Court: Do you understand that all of the parties who have approved this form of order so intended from this order?

Mr. Graham: That is my understanding and I think the understanding of all counsel, your Honor.

The Court: That is approved by the court. I think it is appropriate that they should be con-

solidated for trial of that issue, and any and all other issues unless specific other arrangement is made concerning it.

* * * *

[18]

The Court: I will now hear your first witness.

Mr. Graham: I will call Mr. Northcutt.

The Court: Come forward.

Is this a going forward by defendants in their proof in support of the defendants' affirmative defense?

Mr. Graham: Yes, your Honor.

The Court: You may proceed.

RAY H. NORTHCUTT,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Graham:

Q. Would you state your name for the record.
Mr. Northcutt? [34]

A. Ray H. Northcutt.

Q. What is your position?

A. Vice-President of Guy F. Atkinson Company.

Q. That is the defendant Guy F. Atkinson Company here involved? A. Yes, sir.

Q. Were you in the employ of the Guy F. Atkinson Company during 1943, 1944, and 1945?

A. Yes, sir.

Q. What was your capacity?

(Testimony of Ray H. Northcutt.)

A. Contractors' representative in charge of operations in Alaska in connection with War Department contracts, including the Seattle headquarters office.

Q. You referred, Mr. Northcutt, to the Alaska operations. Without elaboration, would you state just briefly what those operations were?

A. We had contracts with the War Department for the construction of bases in the Aleutians at the Islands of Adak, Shemya, Attu, and Amchitka, cost-plus-fixed-fee contractors for the War Department.

Q. Defendants' Exhibit 13, being Contract Number 202, Mr. Northcutt, referring you to such contract, was that one of those involved in the Alaska operations?

A. The contract known as Number 202 covered all of the operations of our company in the Aleutians. [35]

Q. You held a prior contract to 202?

A. Yes. We held a prior contract known as Number 7100 for similar construction as cost-plus-fixed-fee agents of the War Department at Excursion Inlet prior to the 202 contract. They ran concurrently for a short time.

The Court: Did you say 202 covered all of your company's activities in Alaska?

The Witness: In the Aleutians; and the Contract Number 7100 covered a similar military base construction at Excursion Inlet in Alaska itself.

Q. (By Mr. Graham): When did you com-

(Testimony of Ray H. Northcutt.)

mence operations under Contract Number 7100, Mr. Northcutt?

Mr. Flood: Objected to on grounds that thus far there is no showing of materiality. 7100 is not involved in any litigation here.

Mr. Paul: Well—

Mr. Flood: If you wish me to withdraw my objection, I will.

Mr. Paul: Thank you.

Q. (By Mr. Graham): When did you finish your contract operations at Excursion Inlet?

A. In August, 1942.

Q. Do you recall when Contract 202 was signed? [36]

A. Contract 202 was signed on or about September 30th, 1943.

Q. Did you participate in the negotiations for Contract Number 202? A. Yes, sir.

Q. Who were the others who participated in such negotiations?

A. Mr. Guy F. Atkinson, the Chairman of our Board of Directors and myself for our company; Col. DeLong, Major Tait, Mr. Noble—principally, for the War Department. All of those names were contracting officers for the War Department.

Q. Were the pay policies and wage rates a subject of discussion at these negotiations?

A. They were.

Q. Was there discussion as to appendices "D" and "E" of the prime Contract 202?

A. Yes. Appendices "D" and "E" were a part

(Testimony of Ray H. Northcutt.)

of the prime contract and they covered the manual and non-manual individual employment contracts—

Mr. Flood: Just a moment, your Honor. I object to it on the ground the contract speaks for itself as to what coverage is involved therein. I object to oral testimony characterizing the meaning of the contract. [37]

Mr. Graham: If your Honor please, we were not illustrating the meaning of the contract.

The Court: I think this question goes farther than to say what this witness thinks the exhibits or documents refer to as subject matter. I believe this objection should be sustained with leave to inquire as to what subjects it deals with.

Mr. Graham: If your Honor please, the question is preliminary. I suggest that we have here in issue the good faith of these defendants with respect to their operations pursuant to their contracts and certainly with respect to the pay policies which they placed into effect and which they followed. I would like to ask the reporter to re-read the question and ask the court to reconsider.

The Court: The reporter may read it.

(Last question and answer repeated by the reporter.)

Mr. Graham: I ask that the last portion of the answer be stricken.

The Court: Do you want to strike the question and reframe it?

The question produced the last answer.

Mr. Graham: The question I believe is proper, [38] your Honor. The witness gave an answer and

(Testimony of Ray H. Northcutt.)

then gave a further statement which counsel objected to as not responsive to the question.

The Court: The last part of the answer is stricken and the court will disregard it.

Q. (By Mr. Graham): Was Circular Letter Number 2236 a subject of discussion in those conversations to which you made reference?

A. Yes.

Q. You were furnished with the substance of Circular Letter Number 2236? A. Yes, sir.

Q. Did you specifically discuss the question of overtime compensation at these contract negotiations? A. Yes—at great length.

Q. At that time, what instructions were given you with reference to Circular Letter Number 2236?

Mr. Flood: Your Honor, I object to that on the grounds first of all that it is purely hearsay; secondly, that the contract speaks for itself and that we are not bound by any ex-parte instructions that did not rise to the dignity of being regulations or orders, or those matters named in the Act specifically as matters of defense. [39]

Mr. Graham: If your Honor please, I would like to be heard.

The Court: I think for one thing the question assumes that instructions were given.

Mr. Graham: I shall withdraw the question, your Honor. I would like to make comment as to Mr. Flood's—

The Court: I will hear your comment after you get properly up to the subject.

(Testimony of Ray H. Northcutt.)

Q. (By Mr. Graham): During the course of negotiations with respect to Contract 202, Mr. Northcutt, did you receive instructions relating to Circular Letter Number 2236? A. Yes.

Q. Without stating the substance of the documents of Circular Letter Number 2236, can you state what instructions you received with reference to Circular Letter Number 2236?

Mr. Flood: Objected to except that it may be answered yes or no.

The Court: Read the question, Mr. Reporter.

(Last question repeated by the reporter.)

The Court: Do you mean what kind? [40]

Mr. Graham: What were the instructions?

Mr. Flood: That is a different question.

Mr. Graham: I was one ahead of myself. I am sorry.

Q. (By Mr. Graham): Did you receive instructions? A. Yes.

Q. What were those instructions?

The Court: Are you asking him for instructions which were given in some written document?

Mr. Graham: No, sir.

Mr. Flood: I object to it, your Honor, as being incompetent, irrelevant and immaterial unless—

The Court: It is permitted to ask him what the instructions relate to—what subject—before he answers what they were. I want to know in what form they were before he tells over objection what the specific instruction was.

Mr. Flood: In order that my objection may be

(Testimony of Ray H. Northcutt.)

complete for the record, preliminarily I am entitled to know whether the instructions were oral or in writing.

The Court: That was one of the things the Court had in mind.

Mr. DeGarmo: I think perhaps your Honor's [41] question is prompted by the fact that you have not yet had opportunity to read Circular Letter Number 2236. The question was directed with respect to Circular Letter Number 2236 and a knowledge of that instrument would immediately disclose the subject matter of the instructions with reference to it.

The Court: Does it have an exhibit number?

Mr. DeGarmo: Yes. It has Exhibit Number 14. It is Number 2236. It is quite a lengthy document, a circular letter, dealing with questions of pay and overtime policies in regard to cost-plus-a-fixed-fee contracts. Mr. Graham had attempted to obviate the witness speaking with respect to a document in the previous question because the objection was made that the document speaks for itself.

The Court: I think he ought to state what the form of instructions was.

Mr. Flood: I am entitled on voir dire to ask him.

The Court: You may ask him.

Q. (By Mr. Flood): Were your instructions oral?

A. My instructions were both oral and written.

Q. Were they prior to your being shown a copy of 2236? A. 2236. [42]

(Testimony of Ray H. Northcutt.)

Q. Were they prior or subsequent to your seeing a copy of 2236?

A. Both prior and subsequent.

Q. Was 2236 in writing? A. Yes, sir.

Mr. Flood: I object to it, your Honor, on the ground that it is hearsay oral conversations. We don't know who gave them. We are deprived of the right of confirmation and cross-examination. It is purely hearsay, in the first place, not admissible and not binding upon us.

Mr. Paul: And upon the further ground that this is preliminary to the signing of the prime contract between the defendants and the United States.

Mr. Graham: If your Honor please, there is no reference made in the prime contract to Circular Letter Number 2236. The witness has testified that there were both oral and written instructions relating to Circular Letter Number 2236. To show the good faith of this company and this defendant, we are certainly entitled to show what instructions he received with regard to this very important document.

Mr. Flood: We are certainly not going to be held by instructions by anonymous people. If they are oral instructions, they are hearsay. If they are [43] written, their competency may be determined after examination of them in writing.

Mr. Graham: The test is what was their conduct. The instructions they received are certainly a proper matter of inquiry here. The instructions

(Testimony of Ray H. Northcutt.)

are not offered as hearsay for the proof of the truth or falsity of anything contained in those instructions. We are offering to establish the state of mind or the good faith of the defendant and the defendant companies. And Mr. Flood's objections as to hearsay is completely beside the point.

The Court: Can you establish who gave the instructions in each instance?

Miss Krug: Your Honor, might I comment on Mr. Graham's last statement?

The Court: You may.

Miss Krug: He has stated he is attempting to prove good faith. He has also stated he is attempting to prove compliance with instructions. Therefore, the oral statement of this witness as to what instructions he received is self-serving, because the content of those instructions is highly important as to whether or not they were complied with.

The Court: The court will have to know who gave the instructions and whether they were oral or in [44] writing.

Mr. Graham: The witness has already testified they were both oral and written instructions.

Q. (By Mr. Graham): By whom were oral instructions given you, Mr. Northcutt, relating to Circular Letter Number 2236?

A. Oral instructions were given to us by Mr. Noble, Major Tait.

The Court: Who was Mr. Noble?

The Witness: Contracting officer for the War Department. Major Tait, Contracting Officer for

(Testimony of Ray H. Northcutt.)

the War Department, Mr. Rehfeld and Mr. Shepherd, Chief Auditor and Auditor of the War Department.

The Court: You may inquire as to what part of the subject matter dealt with in 2236 the instructions concerned.

Mr. Flood: I don't want to be captious but at this point I wish to interpose another objection.

The Court: You may do so.

Mr. Flood: I object to its competency, relevancy and materiality. Obviously, if he received instructions, they were either pursuant to or in conformity with 2236 or else they varied with 2236. If they are varied, they come under the new evidence rule. [45] In either case, it is self-serving and is immaterial.

Mr. Graham: Does Mr. Flood concede that the oral instructions are part of the contract of this defendant?

Mr. Flood: I only state that they are incompetent by any rules of evidence.

The Court: The court will overrule this objection.

Do you consider the answer finished?

Mr. Graham: The answer to that question was finished in response, your Honor.

Q. (By Mr. Graham): I desire to ask the witness what were the instructions which either of these gentlemen or any or all of them gave to you as the representative of Guy F. Atkinson Company; what were those instructions in so far as they related to 2236?

(Testimony of Ray H. Northcutt.)

Mr. Flood: I object to that, your Honor.

The Court: It is overruled.

Mr. Flood: The record will show that I object on the grounds heretofore made.

The Court: Yes.

Mr. Paul.

Mr. Paul: Yes. On the further ground that the time—that is, the date as to which the instructions [46] were given and who was present as far as you can recall. State the surroundings.

Miss Krug: Your Honor, may the record show my specific objection to this specific question on the ground that any declaration of this witness as to the oral instructions that he received in connection with Number 2236 is hearsay, and on that grounds specifically. It is hearsay because the content of those instructions is one of the matters at issue in this case.

The Court: Let the record show that.

(Last question repeated by the reporter.)

The Court: Try to state when the instructions were given and who was present and where they were given.

A. The instructions were given by the parties referred to before in the offices of the War Department prior to the execution of Contract 202, and during the discussions of the problems to be encountered in the performance of the work that we were about to undertake.

Q. Where were those offices located?

The Witness: In the Central Building at that [47] time.

(Testimony of Ray H. Northcutt.)

The Court: What city?

The Witness: Seattle.

The Court: Do you know who was present?

The Witness: Yes; Mr. Noble, Major Tait, Mr. Rehfeld and Mr. Shepherd of the War Department.

The Court: Anyone else?

The Witness: Mr. Atkinson of our company was present a great deal of the time, and I was present at all of the negotiations.

The Court: With reference to the subject he inquired of, you may answer the question.

The Witness: The subject of the discussions was the hours of work and payment of overtime policies prescribed by the War Department.

Q. (By Mr. Graham): Now specifically, Mr. Northcutt, what were your instructions on those occasions to which you have just referred in so far as those instructions referred to Circular Letter Number 2236?

Mr. Flood: Your Honor, I think the last question, the subject of the instructions might be competent but the contents would be highly—

The Court: It seems to me the last question calls for a conclusion. [48]

Mr. Graham: May I state, your Honor, that the issue involved in this proceeding is the testing of the compliance or non-compliance with the regulations, orders, and what not of the War Department and the interpretative bulletin of the Administrator himself in the construction of this Act makes

(Testimony of Ray H. Northcutt.)

specific reference to the obligation of the employer or the opportunity of the employer to show that they were in good faith in conformity with and reliance on any written or non-written instructions or rulings.

The Court: The court's comment is that it seems to form a conclusion of this witness. It would be proper, in my opinion, for him to state the substance of what was said and who said it.

Mr. Graham: I intended to do that, your Honor. I am sorry I misphrased my question.

Miss Krug: I object to that question, your Honor, on the grounds that it relates to preliminary negotiations according to the last answer given by this witness and that all such negotiations are merged in the prime contract.

The Court: Let the record show that. And the same ruling by the court each and all of these objections—overruled. [49]

Q. (By Mr. Graham): Mr. Northcutt, will you state what these instructions were on the statements made to you as a representative of the defendant in so far as they related to Circular Letter Number 2236?

A. That we would be governed by them in the conduct of operations under this contract.

Mr. Flood: I object on the general ground which I assume your Honor will overrule on the same ground; and in addition thereto I think we are entitled to know who said what.

The Court: I wish you would state who said what, if you can recall.

(Testimony of Ray H. Northcutt.)

The Witness: I have already identified them, your Honor.

Q. (By Mr. Flood): It might be half a dozen. Did they all talk at once or what?

A. No. This was a meeting that went forward over a number of days.

The Court: Can't you state who was talking?

The Witness: Mr. Noble, Contracting Officer; Major Tait, Contracting Officer; Mr. Rehfeld, Auditor, and also Mr. Shepherd.

The Court: Can't you appropriately among those gentlemen name the ones who speak of this matter or [50] the various kinds of subject matter within this general topic?

The Witness: All of them did, sir. The auditors were there to assist the Contracting Officers in interpretation of regulations and to outline for us the conduct of our operations because in a matter of overtime, regulations, this particular Circular Letter, Executive Orders, having bearing on these matters were of prime importance to us in recruiting forces and conducting our work. And they were the subject of numerous discussions at that time both before and after the discussion of the contract.

Q. (By Mr. Graham): What were those statements by those individuals.—if you can't repeat verbatim the wording in Mr. Noble's mouth or Major Tait's wording, or any of the other individuals, will you indicate what was the substance of those statements by those individuals?

(Testimony of Ray H. Northcutt.)

Mr. Flood: Your Honor, I object to the form of the question. I object to the question generally and also I object to the form of the question. It pre-supposes that he can't state what anyone of these people said. If that is to be one of their defenses under this Act, which we are going to submit should [51] be strictly construed,—if it is going to be a defense that they relied upon statements, they should be statements that are more than anonymous. As a matter of fact, the administration's ruling doesn't say that they can rely upon anonymous statements. But if they are going to be the subject of defense, we are entitled to know what the statements were and not some conclusion as to what they amounted to. We are entitled to know what they were. Mr. Noble might appear here. Under the former question, we wouldn't be able to examine him with reference to where or when he said something because the witness doesn't know if he said it or one of half a dozen other people said it.

The Court: The objection is overruled.

Miss Krug: I should like to bring in my objection to hearsay of this line of questioning, also.

The Court: Objection overruled. Proceed.

If you need the question read to you, that will be done. You should keep your mind on the question and let counsel and the court consider the objection.

A. I might say, sir, that what I have attempted to explain was stated to us by each of the individuals that I have referred to; and many times

(Testimony of Ray H. Northcutt.)

it isn't a question of who said what. Each one of these four [52] people on several occasions gave the instructions as I have just answered.

Q. (By Mr. Graham): Maybe I got lost in the objections. I still haven't heard what the statements to you were.

A. The statements to us were that we would be governed by the regulations in Circular Letter 2236 specifically, as well as other regulations, in regard to the employment of personnel, the payment of wages, salaries and overtime. And those instructions were reiterated by Mr. Noble and by Major Tait and by Mr. Rehfeld and by Mr. Shepherd.

Mr. Graham: May I ask the bailiff to refer Mr. Northcutt to Exhibits 53 and 54.

The Court: At this time we will take a 5-minute recess.

(Recess.)

The Court: You may proceed. The court would like to know what this witness knows of the assignments of each one of these persons named by him in his previous testimony as having participated in these instructions. I would like to know what this witness knows concerning the assignments of those men.

Mr. Graham: The positions they held, your Honor? [53]

The Court: With respect to these contracts. I wish counsel to ask appropriate questions to bring out that information.

Q. (By Mr. Graham): Can you identify the

(Testimony of Ray H. Northcutt.)

positions held by each of these individuals you named?

A. Major Tait was Chief of Alaska operations at that time, I believe, in the office of the War Department in the District Engineer's office in Seattle. Mr. Noble was Contracting Officer, Civilian Officer of the War Department attached to the same division.

The Court: You used the words "Alaska operation." What kind of Alaska operations? Will Counsel please ask for that information in a question of appropriate form?

Mr. Graham: That is a technical name, your Honor. That is the name of a branch.

The Court: Let the witness explain that.

Q. (By Mr. Graham): Will you identify Major Tait and describe the position held by him?

The Court: With reference to these contracts that are here in dispute.

A. Major Tait and Mr. Noble were both designated as Contracting Officers under these contracts by the [54] Commanding General of the Alaska Department of the Army. They were both stationed in Seattle in the War Department District Engineers' office which operated as a service office to the Army in Alaska and the Aleutians.

Q. (By Mr. Graham): Who were the other individuals?

A. Mr. Rehfeld was Chief Auditor in Charge of the auditing of all cost-plus-a-fixed-fee War Department construction contracts.

(Testimony of Ray H. Northcutt.)

The Court: Chief Auditor for whom, Counsel? Will you ask the witness that question or a question in proper form?

Q. (By Mr. Graham): I believe, your Honor, that if he will describe the position held by the person, he will be doing so. Will you so describe?

A. Mr. Rehfeld was Chief Auditor for the War Department in the District Engineer's Office of the War Department in charge of the auditing for all cost-plus-a-fixed-fee Military construction in Alaska and the Aleutians.

Q. Where was his office?

A. In the District Engineer's Office of the War Department in Seattle. [55]

Q. Who was the other individual?

A. Mr. Shepherd was an assistant to Mr. Rehfeld.

The Court: In respect to what activities?

The Witness: The construction activities of all cost-plus-a-fixed-fee contractors performing work for the War Department in the combat area in the Aleutians and in Alaska.

Q. (By Mr. Graham): Would you refer, Mr. Northcutt, to Exhibits numbered 53, 54, and 56.

A. Yes, sir.

Q. Can you state, Mr. Northcutt, what the practice was of the Guy F. Atkinson Company with reference to the use of these non-manual employment contract forms?

Mr. Paul: Just a minute, your Honor. I would like to examine voir dire before—

(Testimony of Ray H. Northcutt.)

The Court: Read the question.

(Last question repeated by the reporter.)

The Court: What objection do you have, Mr. Paul?

Mr. Paul: I have an objection that is not present or clear in the record which will be developed on voir dire.

The Court: Let's see further what other [56] questions are coming. I think this question may properly be answered.

Mr. Paul: We have further objections on the ground that,—may I have the question again?

(Last question repeated by the reporter.)

Mr. Paul: I object to the question on the ground that the time during which this practice was supposed to have been had is not apparent in the form of the question.

Miss Krug: Your Honor, I would like to join in Mr. Paul's objection. Exhibit 53 and the following exhibits to which Counsel has directed this witness' attention are dated,—the first one, August 1, 1944. I understand we are still on the preliminary negotiations for this contract which was executed some time prior to that. Exhibit 53 is a letter transmitting some revisions of some uniform contracts of employment and we haven't established any contract of employment as yet in this proceeding.

Mr. Graham: If your Honor please, the defendants' exhibit 13 has been offered here, being the prime contract and the supplements thereto,

(Testimony of Ray H. Northcutt.)
together with the appendices listed in the contract forms. I hope there isn't any assumption justifiable for [57] the statement that we are examining with respect to preliminary negotiations. I have asked the witness a question and referred to three specific documents.

The Court: The objection is overruled. I assume that this question is with reference to the construction contract for installations in Alaska. Does anybody object on that ground,—that it is not so stated in the question?

Mr. Paul: No, I have no objection on that ground. I do have another objection.

The Court: Very well. You may state it.

Mr. Paul: I don't believe your Honor included it within his ruling; that is, I object to the form of the question because the period during which this practice was supposed to have been had by the defendants is not apparent in the form of the question.

The Court: The objection is overruled. That may be brought out later either on direct or cross-examination.

Mr. Paul: My information, your Honor, is that this man was not connected with the company from late in September, 1944 except in a very remote, indirect fashion and therefore it is beyond the knowledge of this witness. I want to examine on voir dire.

The Court: In answering the question, state [58] only what is within your knowledge and be

(Testimony of Ray H. Northcutt.)

certain you confine your statement to your own knowledge.

A. Number 53 and 54 relate to revisions of the uniform non-manual employment contracts, made a part of the contract, and prescribed for the use of our company and all cost-plus-a-fixed-fee contractors for the War Department; and they were followed exactly as directed throughout the life of the contract. These happen to have been received by myself, as a matter of fact.

Miss Krug: Your Honor. I move that that answer be stricken. It is beyond the scope of the question.

The Court: Do you mean the last part of it?

Miss Krug: Yes.

The Court: "This one happens to have been received by me"?

Miss Krug: No. I understood that he said it was used during the life of the contract.

Mr. Graham: Your Honor, I asked Mr. Northcutt what was the practice with regard to these non-manual forms.

Miss Krug: I withdraw the objection. I am sorry, your Honor. [59]

A. (Continuing): 56 is a directive from Col. Lang, Contracting Officer of the Corps of Engineers, War Department, from the headquarters of the Alaskan Department at Anchorage.

Mr. Graham: I withdraw that Exhibit 56. I have the wrong number, Mr. Northcutt. I withdraw Exhibit 56 in so far as my question was concerned.

(Testimony of Ray H. Northcutt.)

The Court: Do you mean you withdraw the question so far as it relates to Exhibit Number 56?

Mr. Graham: In so far as it relates to Exhibit Number 56. I would substitute in lieu of 56 the Exhibit Number 66.

A. (Continuing): Exhibit 66 is likewise a similar—

Mr. Paul: Your Honor, I request a voir dire as to this man's knowledge. Here is a document dated June 6th, 1945.

The Court: You may inquire on the voir dire as to his knowledge.

Q. (By Mr. Paul): You were in the Navy, were you not, Mr. Northcutt? A. Yes, sir.

Q. When did you enter the Navy?

A. At the end of September, 1944.

Q. And you were employed full time by the Navy up to that [60] date? A. Yes, sir.

Q. For how long a time?

A. Until the end of March, 1946.

Q. Were you assigned to Seattle?

A. No, sir.

Q. Where were you assigned during that period?

A. Washington, D. C.

Mr. Paul: Your Honor, I move that his response to the previous question be stricken.

Mr. Graham: If your Honor please, I would like to continue the voir dire.

The Court: You may do so.

Q. (By Mr. Graham): While you were in Service with the Navy, Mr. Northcutt, did you continue

(Testimony of Ray H. Northcutt.)

to serve as an officer of the Guy F. Atkinson Company? A. Yes, sir.

Q. Were you in consultation with the officers and other executives of the company?

A. Yes, sir.

Q. What participation did you take in the management and particularly in the policies of the company following your going into the Navy?

A. Copies of all correspondence from our company and from [61] the War Department pertaining to labor matters and unsettled claims,—either of our claims with the government or employees with the company, were forwarded to me in Washington. I received telephone, telegraphic and letter inquiries, consultations with Mr. Guy F. Atkinson, Mr. George Atkins, President of our Company and from time to time visits from Contracting Officers of the War Department who had occasion to come to Washington. I was called to the War Department on various occasions for conferences in connection with matters pertaining to the sub-contract.

Q. Were you familiar with the labor policies and practices of the company during that period?

A. Yes, sir.

Mr. Graham: I submit Mr. Paul's motion.

The Court: Is there anything further?

Mr. Paul: Yes.

Q. (By Mr. Paul): During this period of time, how many times were you in Seattle?

A. During the times I was in the Navy?

Q. Yes.

A. Once for a period of nine days.

(Testimony of Ray H. Northcutt.)

Q. Other than that, your sole knowledge was from letters, [62] communications, and telephone calls that you had between your Seattle office and yourself?

A. And personal visits from our company officials and the War Department representatives.

Q. Did you ever inspect any payrolls in this manner?

A. I don't recall ever having inspected a payroll.

Q. So you never saw, during this period of time, any payroll reflecting the payroll inspections of anybody?

A. Not payroll inspections, no, sir,—either before or after I went into the Navy. We had other people do that.

Q. (By Mr. Graham): You have had opportunity to examine records of the company since that time, Mr. Northcutt?

A. Yes, indeed.

Q. Were you at that time familiar with the activities of the company with reference to the various letters and instructions from the War Department?

A. Yes, sir; I was very familiar with it.

Mr. Paul: I renew my objection, your Honor, to strike any testimony he may have given in the last two questions and answers relating to any practice of the company, commencing with the first day of October, 1944 until after his return from the Navy, on the ground that he was not there; he had, by his own admission, [63] admitted that he has never inspected any comparison between the pay-

(Testimony of Ray H. Northcutt.)

rolls, and that the pay policies of the company are far beyond his knowledge; further, that he cannot signify his knowledge by his own statement.

The Court: The court has heard the testimony on the voir dire and has heard and will hear the other pertinent testimony from this witness in the direct examination. The objections are overruled.

Q. (By Mr. Graham): There is still pending that portion of the question relating to Exhibit 66—in substitution for Exhibit 56—as to the non-manual forms of employment.

A. Exhibit 66 is a modification of the uniform non-manual employment contract prescribed for employees of CPFF contractors and that incorporated in the procedure and followed exclusively.

Q. Mr. Northcutt, if in fact the company had utilized any different non-manual contract employment form other than the one specified in Appendix “E” to the contract, being Exhibit 13, or those specified in Exhibits 53, 54, and 66,—if in fact the company had authorized any different non-manual contract form, would such fact have come to your knowledge? [64]

Mr. Flood: I object to that. It calls for an argumentative conclusion. It is hypothetical to start with, assumes something and calls for a hypothetical conclusion.

The Court: Objection sustained.

Mr. Graham: I will rephrase the question.

The Court: That is permissible.

Q. (By Mr. Graham): Did Guy F. Atkinson

(Testimony of Ray H. Northcutt.)

utilize any non-manual employment contract form different from the one specified in Appendix E to the prime contract, Exhibit 13, are the ones specified in Exhibits 53, 54 and 66?

A. No, sir; it did not.

Q. Do you know that of your own knowledge, Mr. Northcutt? A. Yes, sir.

Q. Mr. Northcutt, can you state what was done by you and the Guy F. Atkinson Company with reference to the establishment of wage rates, wage policies including overtime compensation policies, as you began your operations under Contract 202?

A. We submitted an organization chart and a—

Miss Krug: Your Honor, I would like to object to any testimony from this witness relating to the practice of the establishment of wage rates. [65]

Mr. Graham: The matter of wage rates and wage policies are all intertwined. We are testing the good faith of the defendant and the policies they established. The matter of overtime policy is a matter of the wage rate structure. It is a portion of the program of establishing the matter that is inquired of.

The Court: In what way would you expect that to be true; can you give an example?

Mr. Graham: As I understand a wage structure or a rate structure, it would encompass the various methods in which the pay—including total take-home pay—were established as well as the basic—

The Court: In other words, as to how much one

(Testimony of Ray H. Northcutt.)

would earn during the given period like a week or a 2-week period or a month period?

Mr. Graham: That is correct, sir; that was their problem, to set up their rates and how they were to be compensated.

The Court: And dealing with a rate to arrive at those estimates or desired results or objectives, is that what you mean? If not, what do you mean?

Mr. Graham: I have inquired of Mr. Northcutt as to what steps they took to set up operations in so [66] far as their wage and overtime structures which are all inter-related. I don't see how they can be separated.

The Court: Are you going to tie up with the matter of overtime the information which you seek to elicit by the question objected to?

Mr. Graham: That is right. They are inter-related.

The Court: Well, are you going to try to show by this witness and do you expect to show by this or some other witness that they are related?

Mr. Graham: Very decidedly, your Honor.

Miss Krug: Your Honor, may I make one further comment?

The Court: You may.

Miss Krug: The Fair Labor Standards Act as you know contains two provisions, one specifically with respect to minimum wage rates and the other with respect to overtime compensation. The overtime compensation required to be paid by the Act has nothing whatever to do with the minimum wage rate which is established by the other provisions

(Testimony of Ray H. Northcutt.)

of the Act, has nothing to do with the amount of take-home pay which is included but simply provides that an employee shall receive time and one-half for every [67] hour worked over 48 hours within a week. I submit to the court that the rate of pay a man receives has no bearing whatsoever on the question of whether or not he receives overtime or the question of whether or not he was denied it.

The Court: The objection is overruled.

A. We were required to and did submit organization charts and schedule of non-manual salary ranges and base rates in accordance with the regulations of the War Department.

Q. (By Mr. Graham): Did those wage structures or pay structures reflect overtime compensation? A. Yes.

Q. And in what manner; will you describe how they were set up or established?

A. The schedules for our Seattle headquarters office for these operations were based on a 44-hour work week, to begin with, and were later converted on instructions from the War Department—

Mr. Flood: I object to that as not responsive, your Honor. I move that that portion of it be stricken and go out.

The Court: It will be stricken. The court will disregard it. Answer the question directly. [68]

Q. (By Mr. Graham): What did you do, Mr. Northcutt?

A. We established these salaried schedules, base

(Testimony of Ray H. Northcutt.)

rates, overtime, salary ranges, in accordance with the War Department regulations—

Mr. Flood: I object to that as purely voluntary.

Mr. Graham: A part of the Pre-trial Order is a letter from the War Department to Birch-Morrison-Knudsen which it is stipulated applies to all defendants and in which certain instructions were given with reference to a 48-hour week for Seattle office employees. When counsel makes the objection there is no evidence of that, counsel is speaking an untruth.

Mr. Flood: Certainly I am on sound ground when I say it is voluntary and unresponsive.

The Court: May I see that. Mr. DeGarmo?

(Mr. DeGarmo gives page to the Court.)

Mr. Flood: I also object to counsel charging me with speaking an untruth. I can very often be wrong but I don't want to be charged with speaking an untruth.

Mr. DeGarmo: I apologize if you take it in that light, Mr. Flood.

Mr. Flood: There is no other connotation of the term. [69]

Mr. DeGarmo: It is stated in the case.

The Court: The court considers it corrected to that extent by Mr. DeGarmo.

Mr. Flood: I object to it as not responsive and voluntary.

The Court: The objection that it is not responsive is sustained.

Q. (By Mr. Graham): Will you refer to Exhibits Number 26 and 22?

(Testimony of Ray H. Northcutt.)

A. Yes, sir.

Q. With reference to those two exhibits, will you state what the Guy F. Atkinson Company did?

Mr. Flood: I am going to request that the compound question be split into one.

The Court: Be sure to ask just one question calling for one answer.

Q. (By Mr. Graham): With reference to the non-manual employees of the company employed in the Seattle headquarters office,—and referring to Exhibit Number 26, Mr. Northcutt—can you state what the company did with respect to the establishment pay structure?

A. We compiled the submission represented in Exhibit 26, submitting it for approval, and it constitutes a [70] schedule of classifications, weekly salary ranges covering all anticipated non-manual, administrative, supervisory and clerical positions in our Seattle headquarters office in connection with the 202 contract. It sets forth the ranges.

The Court: Ranges of what?

The Witness: Ranges of salaries.

The Court: Does that refer to the plaintiffs?

The Witness: Yes, sir; Guy F. Atkinson Company.

Mr. Flood: That is one of the defendants, is it not?

The Witness: I mean defendants, yes,—I am sorry.

The Court: Salaries of whom?

The Witness: Salaries of the plaintiffs would

(Testimony of Ray H. Northcutt.)

be included in this admission, yes,—employees of Guy F. Atkinson Company.

The Court: I would like to find a good place to stop the proceedings today. Are we near such a place now, in your opinion, Mr. Graham?

Mr. Graham: I am afraid this particular line of inquiry will be somewhat lengthy, your Honor.

The Court: Very well, then. We will stop here for today.

Miss Krug: Your Honor, may I have the privilege [71] of serving a trial brief at this time and serving copies upon counsel?

The Court: I would like that done. The same thing is welcomed from other counsel.

(At 4:30 p.m., Monday, December 8, 1947, proceedings adjourned to 10:00 a.m., December 9, 1947, in the United States Court House.) [72]

Seattle, Washington

December 9, 1947, 10:00 o'clock a.m.

(All parties present as before.)

The Court: You may proceed.

RAY H. NORTHCUTT (Resumed)

Direct Examination (Continuing)

Q. (By Mr. Graham): Would you refer to Exhibit 24? (Document handed to the witness.)

A. Exhibit 24 is a letter dated October 29, 1943, to Guy F. Atkinson Company from the War Department signed by Major Tait, Contracting Offi-

(Testimony of Ray H. Northcutt.)

cer, and directing us to place into effect the following policy for our Seattle office——

Mr. Flood: Just a moment, your Honor. As to what the directions contained in the exhibit may be, the exhibit will speak for itself.

The Court: Yes. Do not state the contents of the exhibit. You can refer to the character of the information contained in the exhibit.

A. (Continuing): Exhibit 24 is a Directive from the War [73] Department as mentioned, dated 29 October '43, directing us to place certain——

Mr. Flood: The same objection, if Your Honor please.

The Court: You can say what the character of the information is in the letter; that is all. Do not say what it says. You may speak of the kind of information that is in there.

A. (Continuing): The information in the letter is directives relative to the calculation of salaries for non-manual employees, broken down into three groups. It sets forth the formula for computing salaries.

Mr. Flood: Your Honor,—well, all right.

Q. (By Mr. Graham): Mr. Northcutt, with reference to the date of this letter—being Exhibit Number 24——

Mr. Flood: May we have the date of it now?

Q. (By Mr. Graham, continuing): ——October 29, 1943, can you state whether or not, on or about such date, you were furnished a copy of Cir-

(Testimony of Ray H. Northcutt.)

circular Letter Number 2390, being Exhibit Number 15?

A. Yes. We were furnished with copies of Circular Letter 2390 prior to the date of this directive regarding overtime and salaries. [74]

Q. Were written or oral instructions given to you with reference to Circular Letter Number 2390 by the War Department?

A. Yes, sir; both written and oral.

Q. What were the oral statements made to you on or about this day or prior thereto regarding Circular Letter Number 2390?

A. The instructions were that the provisions of Circular Letter Number 2390 would apply as War Department policy in the establishment and payment of wages and overtime.

Q. Where?

A. Regarding our employees in Alaska, in connection with the Alaskan contracts.

Q. Did 2390 relate to Alaska employees of Seattle employees?

Mr. Flood: Just a moment, Your Honor. That calls for a conclusion as to the contents of the exhibit which speaks for itself. It says on its face to whom it relates.

Mr. Graham: I believe the witness misspoke himself, Your Honor. I would like for him to have the opportunity to refer to 2390 and to his testimony just given.

The Court: He may refer to the exhibit and then you may [75] call his attention to the last ques-

(Testimony of Ray H. Northcutt.)

tion and his answer to it or the question you have in mind and his answer to it.

Q. (By Mr. Graham): Will you refer to this exhibit 24 and particularly the first sentence thereof? A. Yes.

Q. Were the statements made to you regarding 2390 directed toward employees located in your Seattle office or were they directed with reference to employees located in Alaska?

A. They were directed with regard to employees in our Seattle office connected with the servicing of Alaskan contracts.

Q. Does Exhibit 24 represent the written instructions to you relative to 2390? A. Yes, sir.

Q. Mr. Northcutt, will you kindly refer to Exhibits Numbers 27 and 25? A. Yes, sir.

Q. Have you had the opportunity to refer to those? A. I have.

Q. Calling your attention, Mr. Northcutt, specifically to the last paragraph of Exhibit Number 25, I note that the same contains reference to certain approvals to [76] be obtained from the Treasury Department. Would you describe the problem or the circumstance, as you understood it, which gave rise to such instructions.

Mr. Flood: Just a moment. The question certainly assumes an awful lot, Your Honor. I object to the form of the question.

The Court: The objection is sustained. You will employ some other appropriate form.

Q. (By Mr. Graham): Mr. Northcutt, when

(Testimony of Ray H. Northcutt.)

did your company begin operations under Contract 7100 in Alaska? A. In August, 1942.

Q. What were the practices and policies of the company with reference to your operations under Contract 7100 with respect to non-manual employees?

Mr. Paul: I object to that, Your Honor.

The Court: The objection is overruled.

A. All individual employment, the actual employment, and the salaries paid, the overtime paid, and any adjustments therein were subject to the prior approval of the War Department before they could be applied. They were based on a 48-hour work week at Excursion Inlet on the project in Alaska and a 44-hour week in the Seattle headquarters office. [77]

Q. (By Mr. Graham): When you say they were based on a 44-hour work week for the non-manuals in the Seattle office and a 48-hour work week for the non-manuals at the project in Alaska, what do you mean by *that*?

A. Their base rate covered 44 hours of work during the week in Seattle, and 48 hours on the project.

Q. Were any overtime payments made then for work performed up to 48 hours in Alaska and up to 44 hours in Seattle? A. No.

Q. What was the practice—

A. Pardon me; except in the case of,—no, that is correct so far as non-manuals are concerned.

What was the practice relating to the payment of any overtime?

(Testimony of Ray H. Northcutt.)

A. In both Seattle and Alaska?

Q. Yes.

A. Overtime in excess of the base of 44 hours and 48 hours was paid in accordance with the regulations of the War Department, and they applied to three different classes of non-manual employees, depending on their salary range. Employees within these three different groups received overtime payments as prescribed for each group.

Q. Were those practices or those policies set forth in Circular Letter 2236 being Exhibit 14? [78]

Mr. Paul: I object Your Honor.

Mr. Flood: May I hear the question.

(Last question repeated by the reporter.)

Mr. Flood: I join in the objection.

The Court: Sustained.

Q. (By Mr. Graham): What difference in operations were there, Mr. Northcutt, which were contemplated under Contract 202 as distinguished from Contract Number 7100 in so far as hours of employment were concerned?

A. Contract 202 contemplated a considerably longer work week for both manuals and non-manuals than did Contract 7100.

Q. Specifically what was the longer work week?

A. The work week at Contract 7100 was seven 8-hour days, 56 hours. The contemplated work week under the 202 contract in the Aleutians was seven 10-hour days,—70 hours—for both manual and non-manual.

Q. What relationship, Mr. Northcutt, did Exec-

(Testimony of Ray H. Northcutt.)

utive Order Number 9250 and the Wage Stabilization Act pursuant to which it was passed have to this problem you have related as to the difference in the employment weeks?

Mr. Flood: I object to the question as [79] incompetent, irrelevant and immaterial. It calls upon this witness to pass upon a question of law which is reserved for the court's jurisdiction.

The Court: I think the form of the question is objectionable. We can ask him what was done.

Mr. Flood: I was just going to say that. All of the way through here counsel is constantly asking the witness to characterize and draw a conclusion. This case is going to be decided upon what the various parties did. All of the way through I have been inclined to object on the word "practice" but I assume what he means is what they did and I don't want to make any unnecessary objections.

Mr. Graham: I will rephrase the question, Your Honor.

Q. (By Mr. Graham): Did the passage of the Wage Stabilization Act and the promulgation of Executive Order 9250 create a personnel problem in so far as the operations were concerned under the contracts?

A. It created a very serious personnel problem.

Mr. Paul: Just a minute. That question can be answered yes or no.

Mr. Graham: Answer it.

A. Yes, it did. [80]

(Testimony of Ray H. Northcutt.)

Q. (By Mr. Graham): What was that problem?

A. Executive Order 9250 froze our existing salaries at the October 3, 1942, base, I believe. At that time overtime payments to manuals in accordance with Executive Order 9240 produced certain gross earnings. At Excursion Inlet, under Contract 7100, the problem of salaries and overtime payments to non-manuals was aggravated by the increase in manual earnings resulting from the application of the overtime provisions of Executive Order 9240. Executive Order 9250 froze those.

Q. Froze which? A. All of them.

Q. The non-manuals or the manuals?

A. Both; at a time when the Executive Order 9240 placed the non-manuals in a disadvantageous position in relation to manual, so that clerical, administrative, supervisory and engineering employees were dissatisfied with their salary ranges and their gross earnings.

The Court: Will you repeat whether this so-called freezing effect applied to both non-manual and manual employees?

The Witness: Yes, sir. It froze both the manual and the non-manual where they were. The effect of Executive Order 9240 was, as I described, [81] to create an inequitable balance between non-manual and manual.

Q. (By Mr. Graham): Could you describe that in somewhat more detail and illustrate how that resulted?

(Testimony of Ray H. Northcutt.)

Mr. Paul: I don't understand what the question is.

A. A carpenter superintendent, for example, a non-manual employee, would be earning—with the overtime and the long hours they were working—would be earning a weekly salary of \$125 a week, we will say; and a carpenter—a foreman under him but a manual employee—would be making \$145 a week. And a carpenter, also a manual, under the foreman would be making about \$135 a week.

Q. (By Mr. Graham): If 92.50 froze both the manuals and the non-manuals why was any inequity created?

A. Because they froze them at a time before we were able to get any adjustment in the non-manuals.

Q. To repeat my question, Mr. Northcutt: If 92.50 froze both the non-manuals and manual wage or salary rates, why was there any inequity created?

A. Because the overtime provisions of 92.40 gave the manuals a great deal more earnings than the non-manuals.

Q. If base rates were frozen by 92.50, the non-manuals [82] were given substantial overtime payment, is that a fair statement?

A. The manuals.

Q. The manuals; I am sorry.

A. Right. This was further aggravated, to get back to the basis of your question, on Contract 202

(Testimony of Ray H. Northcutt.)

because of the longer contract, for the manuals received 90 hours' pay for 70 hours work. The non-manuals' overtime provisions, however, were as established in the War Department Directives. And the whole wage structure—including overtime—was frozen by Executive Order 9250. So we and other CPFF contractors, agents of the War Department in this Aleutian work, were unable——

Mr. Flood: I move that the characterization be stricken as not responsive.

The Court: As to the last sentence, I think that should be done. You may ask him another question.

Q. (By Mr. Graham): In view of this inequity you have described as existing between the manuals and non-manuals which resulted from the wage freeze and was aggravated by the elongation of the work week on Contract 202, what did you do?

Mr. Paul: I object to it on the ground that [83] it assumes a state of facts which are just not true. When the Stabilization Act was passed and Executive Order 9250 was promulgated by the President, there were no wages frozen if changes were needed to comply with the Fair Labor Standards Act by express command of Congress and the President. There is the stabilization that in 9250 and it is in 9240, too. So when Counsel and the witness assume that there is a freezing, it is not sustained by the law. I object to the assumption of fact by Counsel and the conclusion of the witness in his answer and move that any testimony with respect to freez-

(Testimony of Ray H. Northcutt.)

ing be stricken as irrelevant, incompetent and immaterial.

The Court: The court will overrule the objection.

The Witness: May I hear the question?

Mr. Graham: I will withdraw the question for the moment and ask one or two preliminary questions.

Q. (By Mr. Graham): What was your understanding with reference to your ability or inability of increasing the salary or non-salary payments to the non-manuals?

Mr. Paul: I object to the question on the ground it is clearly self-serving.

Mr. Graham: I suggest any inquiry on this [84] whole problem as to what the good faith of this company was, that Counsel's objection is not well taken.

Mr. Flood: I repeat, Your Honor, that has to be determined by what they did, not what this witness, an officer in the company, being interested in the result of the litigation may now say by way of self-serving argument or conclusion from the witness stand. It is governed by what the parties did. I object to it.

Mr. Graham: I would like to call Your Honor's attention to the Bulletin wherein it is specifically stated that the subjective condition of the mind of the parties here involved is a material issue in this inquiry. I submit that the question is perfectly proper.

(Testimony of Ray H. Northcutt.)

The Court: Do you have reference to the Interpretive Bulletin attached to Plaintiffs' Trial Brief?

Mr. DeGarmo: That is correct, if Your Honor please.

The Court: There is a note at the bottom of the first page saying "Published in the Federal Register Number 18, 1947."

Mr. Graham: Yes, Your Honor. Section 94.15.

Mr. Paul: Page 24, Your Honor.

Mr. Graham: I will reframe the question.

Q. (By Mr. Graham): What was your understanding, Mr. Northcutt, with reference to your ability or the permissibility of your company making any increases in the salary payments to the non-manual employees on a 70-hour work week in the light of Executive Order Number 9250?

Mr. Flood: I join in the objections heretofore made by Mr. Paul and I object further upon the ground that it calls upon this witness to construe and place his construction—and purely a self-serving construction—upon what the effect of 9240 and 9250 and other documents in evidence may mean; and those documents speak for themselves and are before the court for the court's legal construction of the effect thereof and not for any self-serving argumentative conclusions of this witness.

Mr. Graham: I submit we are trying the good-faith performance and action of these defendants with certain instructions and rulings and so forth given to them by an agency of the United States

(Testimony of Ray H. Northcutt.)

And certainly what this defendant understood and what his beliefs were is a material inquiry. [86]

The Court: I have before me that citation which Counsel mentioned a moment ago,—page 24 of this Interpretive Bulletin. I also tried to consider what I understand to be the law of evidence generally concerning an issue of this sort and this kind of a question as relating to that issue.

The objection is overruled.

A. Our understanding was that we could make no changes in our salaries payments computations——

The Court: I believe the question is for your understanding,—rather than “our.”

A. (Continuing): My understanding.

The Court: Mr. Reporter, will you read the answer?

(The last answer in two parts as indicated was repeated by the reporter.)

The Court: You may proceed.

Q. (By Mr. Graham): Mr. Northcutt, what then did you do or your company do with reference to this problem which you have just described?

Mr. Flood: Just a moment.

The Court: I think it should have the condition “if any,”—what if anything did your company do? [87]

Q. (By Mr. Graham): What if anything did you or your company do?

The Court: Is there another objection?

Mr. Flood: I just want it limited to what he knows about.

(Testimony of Ray H. Northcutt.)

The Court: That should be inherent in the question and so considered, Mr. Northcutt.

The Witness: Yes, sir.

A. We held numerous conferences with representatives of the War Department in conjunction with other CPFF contractors' management,—other contractors engaged in similar work in the Aleutians, in the theatre of operations.

Q. (By Mr. Graham): Would you refer to Exhibits number 26 and 22. A. Yes, sir.

Q. With reference to those exhibits, can you state what you did?

A. In conjunction with our submission of these exhibits, which constitute requests for approval of our salary structures, we pointed out the condition that we described—or that I described a short time ago——

Mr. Flood: I submit, Your Honor, we are entitled to know whether that was pointed out orally or [88] in writing, and if in writing, we are entitled to have the writings identified.

The Court: The objection is sustained. I think he ought to say what the form of the advice was.

Mr. Graham: If Your Honor please, I thought that was inherent in the question. I specifically asked him to interpret the two exhibits.

The Court: That objection is overruled. It doesn't ask for conversation.

A. (Continuing): In these two exhibits which constitutes submission for approval of our salary wage structure, overtime payments and so forth,

(Testimony of Ray H. Northcutt.)

we pointed out the inequities and the difficulties encountered in attempting to man the new construction work in the Aleutians under Contract 202, reviewing the difficulties of the former contract and pointing out the aggravated condition under the new contract, and asked for authoritative instructions as to how we should proceed.

Mr. Flood: I wanted to object long before but the witness had such a long sentence, and I waited to let him complete it.

I move that the answer be stricken unless the witness clarifies as to whether the things that he pointed out in that long answer are contained in Exhibits 22 and 26 or whether are are contained in [89] other documents which are independent of Exhibits 22 and 26 and, if so, to identify those documents.

The Court: Mr. Reporter, will you mark that place in your notes? Counsel directing the examination may meet the objection. I think the objection is well placed.

Mr. Graham: I will clarify that, Your Honor,— I think it will save time.

Q. (By Mr. Graham): Were those matters and points to which you referred, Mr. Northcutt, contained in these Exhibits 22 and 26?

A. Yes, sir; in these and others.

The Court: "Others." What others, do you know?

The Witness: Mr. Flood inquired as to whether they are in these and any others. They are set forth in these two and also other exhibits.

(Testimony of Ray H. Northcutt.)

Mr. Flood: We are entitled to have the others identified, then. We are entitled to have in the record anything on which any factual determination may rest.

The Court: Do you know whether those other written manifestations of your acts in connection with the subject matter of these two exhibits are in writing [90] or were they in some other form?

The Witness: They are in writing, sir.

The Court: Do you know whether those writings are available?

The Witness: Yes. They are in some of these that we were looking at yesterday.

The Court: Do you think they have already been given identification marks as prospective exhibits?

The Witness: Yes, sir. They have not yet been discussed but they are——

The Court: At this time do you have in mind accurately what particular exhibits will reflect those? Could you, by a little investigation, determine the numbers?

The Witness: Yes, sir.

The Court: Will you do that?

The Witness: Exhibit 30, Exhibit 31, Exhibit 32, Exhibit 35, Exhibit 36 particularly, Exhibit 40,—and probably others. But those all have a bearing on this problem.

The Court: The answer will now stand. You may address another question to the witness.

Q. (By Mr. Graham): Did the requests for

(Testimony of Ray H. Northcutt.)

authorization to make payments to non-manuals, contained in Exhibits [91] Number 22 and Number 26, call for greater payments to the non-manual employees than you were at that time making?

A. To some classes, yes.

Q. Would you explain that, please?

A. Certain classes of non-manual employees received no overtime under the War Department regulations.

Q. Those were Class "C" employees, commonly referred to? A. Yes; Class "C."

Mr. Flood: I am entitled to inquire whether the classes mentioned relate to the claimants in this action. Class "C" is outside of the issue.

The Court: Is there any response?

Mr. DeGarmo: I think one of Mr. Flood's own clients is a Class "C" employee. Maybe he doesn't recall, but it seems to me that I am correct.

Mr. Flood: Do you recall which one?

Mr. DeGarmo: One of the plaintiffs from the Tyler case was a Class "C" employee, as I recall.

Mr. Flood: I withdraw my objection if there is any question about it.

The Court: In view of the fact that there is some question about that, counsel for the plaintiff has withdrawn his objection.

Mr. DeGarmo: I would want to check that before [92] I made it as a positive statement.

Mr. Flood: Knowing your record for infallibility, I will accept your statement.

Q. (By Mr. Graham): Would you continue the

(Testimony of Ray H. Northcutt.)
explanation of your answer, Mr. Northcutt, referring specifically to Class B. employees?

A. Class B employees received some overtime under War Department regulations but did not receive as much overtime as either Class A employees or manual employees.

Q. What were your overtime payments to Class B non-manuals at that time, if you recall?

A. Class B non-manual employees were required to work any reasonable number of hours, six days per week, and received overtime at the rate of double time I believe for the seventh day. That can be verified from the Directive.

Q. Referring to your submissions, Exhibits 22 and 26, Mr. Northcutt, and your statement that these submissions asked for the approval of increases in payments to the non-manuals—particularly Class B employees—would you illustrate how that was set forth?

Mr. Flood: If it appears in the exhibit, it speaks for itself. "As set forth" implies that it appears in the exhibit. [93]

Q. (By Mr. Graham): Rather than "how set forth," would you indicate or illustrate the increases in the salary payments that were requested by making a comparison for individuals under the Excursion Inlet contract and the approvals then sought in these two exhibits?

A. Well, the non-manual employee at Excursion Inlet, receiving no overtime, and the non-manual employee receiving some overtime, namely, groups

(Testimony of Ray H. Northcutt.)

C and B, respectively, would draw a lesser,—were in an unfavorable position compared to the manual and the non-manual employees who drew full overtime.

Q. Specifically, what was the basis of your request for increases, Mr. Northcutt?

A. The basis of our request for relief in increases for certain non-manual employees was to establish a base pay that would bring them a gross earning under the hours worked under the contemplated Contract 202 which would maintain a proper differentiation for the supervisory people, and the non-manuals in Group C and Group B over the employees who worked under them. Without this relief in many cases the subordinates would draw more money than their superiors.

Q. In other words, if a non-manual worked for 48 hours at Excursion Inlet and his superior received a given salary, if they transferred to Contract 202 and worked [94] sixty hours a week, unless the superior were given an increase in non-manual salary, the manual employee might receive total wage payments in excess of his superior?

A. That is correct.

The Court: At this time we will take a 5-minute recess.

(Recess.)

Q. (By Mr. Graham): Referring you to Exhibits Numbers 27 and 25, what are these exhibits, Mr. Northcutt?

A. These are letters from the War Department

(Testimony of Ray H. Northcutt.)

to Guy F. Atkinson Company in response to our submissions of organization charts and salary schedules.

The Court: What exhibits?

The Witness: Exhibits 22 and 26, respectively.

Q. (By Mr. Graham): Is Exhibit 27 the response to Exhibit Number 26? A. Yes, sir.

Q. And that relates to the Seattle headquarters office personnel? A. Yes, sir.

Q. Is Exhibit Number 25 the response to Exhibit Number 22? [95] A. Yes, sir.

Q. And those relate to the personnel working in Alaska? A. Yes, sir.

Q. Referring you to the last paragraph of Exhibit Number 25, which states:

“In order to obtain approval or adjustment in an established salary range, it will be necessary that your office prepare appropriate requests on forms prescribed by the Treasury Department for submitting to higher authority”

and the statement contained in Exhibit Number 27 that

“We have no established rates to cover the proposed salary range, so the case becomes a definite wage increase under the meaning of Executive Order Number 9250; this being the case, it will be necessary for you to make an appeal to the War Labor Board requesting authorization to make such an adjustment,” can you state Mr. Northcutt, what you did in re-

(Testimony of Ray H. Northcutt.)

sponse to those instructions contained in those two documents, Exhibits Numbers 25 and 27?

A. We conferred with the Labor Relations Division of the War Department and their legal counsel and our Contracting Officers, both separately and with the other CPEFF contractors of the War Department, to obtain [96] instructions and advice as to how to proceed on that. We called on the War Labor Board and the Treasury Department, several meetings, with a request for instructions from them as to how to proceed. This went on over a period of weeks.

Q. Would you specify the individuals who were in attendance at those conferences?

A. Major Tait,—I will identify the agency these people represent when I get through with the list of names. Major Tait, Mr. Noble, at times Major Templeton and Mr. Ross, at times Col. DeLong, at times Major Elwin representing the—

The Court: The latter only you are referring to now?

A. (Continuing): This group of people represented the Alaskan Department of the Army and the District Engineer's office of the Army for Guy F. Atkinson Company, myself in all of the meetings and at times Mr. Nord, my assistant, and Mr. Doyle, our Personnel Manager, Mr. MacLeod of the West Construction Company, Mr. Gedney of the Puget Sound MACCO and Mr. McBride I believe in some meetings for Birch-Morrison-Knudsen. I don't recall the identity of all of the repre-

(Testimony of Ray H. Northcutt.)
sentatives of the other companies. The War Department delegated Guy F. Atkinson Company to make a—— [97]

Mr. Flood: Just a moment, Your Honor. That is a conclusion.

Mr. Graham: I would like to call the attention of counsel to the stipulation here on record in the matter. I think a number of these objections are not——

The Court: I wish you could confine your response to this objection.

Mr. Graham: Specifically this objection, Your Honor, is not here pertinent for we have stipulated that all of the testimony bearing upon the activity of any defendant shall be deemed to relate for and on behalf of all of the other defendants. I think a great deal of time can be saved if that matter is kept in mind.

Mr. Flood: I agree with that. But that doesn't go to my objection, here. My objection here is that the War Department representative is designated their agent by delegation. That agency cannot be proven by the mere statement of an agent.

Mr. Graham: I understood the witness to state that the delegation was as a representative of the other contractors.

Mr. Flood: We are entitled to know what he did. The Court draws the conclusions. [98]

(Last partial answer of the witness repeated by the reporter as follows:

“I don't recall the identity of all of the

(Testimony of Ray H. Northcutt.)

representatives of the other companies. The War Department delegated Guy F. Atkinson Company to make a——’')

Mr. Graham: I suggest that he be permitted to answer the question to see whether this objection lies or whether it doesn't.

The Court: The objection is sustained. I think he ought to say what official of the War Department, if any, told him what concerning any such subject as a delegated authority.

Q. (By Mr. Graham): Would you do so, Mr. Northcutt?

A. The representatives of the War Department, I believe Major Tait and Mr. Noble or possibly Major Templeton of the Legal and Labor Relations Branch delegated Guy F. Atkinson Company——

The Court: Instead of “delegated,”—what did they do that made you think their acts concerned a delegation of authority?

A. (Continuing): They instructed and ordered Guy F. Atkinson [99] Company to make a submission of a uniform salary structure schedule which would be applicable to all CPFF contract or construction operations for the War Department in the combat area of the Aleutians in order to obviate the necessity for each making a separate submission.

The Court: What form did the instruction take?

(Testimony of Ray H. Northcutt.)

The Witness: The instruction was the outgrowth of these——

The Court: In what manner was the instruction communicated, if it was communicated?

The Witness: I don't remember whether they were confirmed in writing or not. They were given to me verbally.

The Court: Who gave them to you verbally?

The Witness: Either Mr. Noble, Major Tait, or Major Templeton or Mr. Ross; I don't recall which.

The Court: Did one of them do it?

The Witness: Yes.

The Court: You may inquire.

Q. (By Mr. Graham): Were you told by those individuals or any of them to whom this submission was to be made? A. Yes.

Q. To whom were you told to make such submission? [100]

A. We were told to make the submission——

Mr. Flood: When the witness testifies: "We were told" I think we are entitled to know who told him.

The Court: And what was said.

Mr. Flood: And what was said.

The Court: I think, Mr. Graham, in order to save time I am sure that is desirable. We should not overlook the ordinary rule.

Mr. Graham: This witness has testified that these series of conferences on this very important matter extended over a number of weeks. A num-

(Testimony of Ray H. Northcutt.)

ber of parties were present. He very categorically states what the instructions made to him were. It seems to me to be reducing the matter to an absurdity if we try to inquire for each specific word on each specific date.

The Court: It may possibly be more appropriate to establish that the witness' memory on each detail is not sufficient at this time for him to so state.

Q. (By Mr. Graham): Can you state what the statements made to you in this regard were and when and by whom?

A. I can't say on what date who said what because that is utterly impossible. The entire discussions were [101] participated in by enough people, and I was extremely active in them so that my veracity in the matter is certainly subject to confirmation. But I can say of a group who participated in these conferences, and expeditions to various governmental offices seeking to obtain instructions, this entire matter was participated in by various members of the management of these CPFF construction firms and the War Department. It was after a number of these conferences that the decision to have one submission made uniformly was made. There is correspondence with the War Department regarding this entire arrangement so that the facts that I have recited are subject to——

Mr. Flood: I object to any correspondence except that which is in evidence.

(Testimony of Ray H. Northcutt.)

A. (Continuing): It is in the——

Mr. Flood: I object to any testimony as to correspondence except that which is in evidence; and as to that correspondence, much of it will speak for itself but not all of it.

Q. (By Mr. Graham): What statements were made to you regarding the uniform submission and by whom, Mr. Northcutt?

A. Mr. Noble particularly, after these conferences, advised [102] us to obtain legal counsel—which we had to that date not been authorized to do—to obtain legal counsel to assist——

Mr. Flood: I move that be stricken, Your Honor,—“up to that date we had not been authorized to obtain legal counsel.”

I know of no law of the land which prevents anyone from seeking legal counsel. It is a mere conclusion as to which there is no foundation in the record or otherwise.

The Court: The objection is overruled.

A. (Continuing): And in response to Mr. Noble's instructions we obtained legal counsel to assist in the preparation and submission of this uniform salary schedule with the problems of adjustment for non-manual rates, gross earnings, and so forth, that we had been discussing.

Q. (By Mr. Graham): Would you refer to Exhibit Number 35? A. Yes.

Q. What is that exhibit?

A. That is a letter from Guy F. Atkinson Company to Mr. Frank L. Mechem, attorney.

(Testimony of Ray H. Northcutt.)

Q. What relationship has it to this problem which you [103] have just discussed?

A. It constitutes a review of the situation I have been discussing and presents that to Mr. Mechem for action.

Q. Mr. Northcutt, would you refer to Exhibits Number 30 and Number 32, and state what relationship they have to the statements you have just made?

A. Exhibit 30, a letter from Guy F. Atkinson Company to the District Engineer, War Department, relates to the previous submission of this problem to the War Department——

The Court: Problem to the War Department?

The Witness: Submission to the War Department of this problem, pointing out some of the difficulties encountered and asking for further advice. Copies of this were sent to the other contractors and to the Treasury Department.

Q. (By Mr. Graham): Relating to Exhibit Number 32, will you state what that is?

A. That is a letter from Guy F. Atkinson Company,—memorandum, rather, from myself as the representative of Guy F. Atkinson Company to the Chief of the Labor Relations Section of the War Department in Seattle, dealing with the submission of non-manual schedules to the Treasury Department. A copy of that went to [104] Mr. Noble, the Contracting Officer.

Q. Did this relate to the submission on behalf of all contractors?

A. Yes, sir.

(Testimony of Ray H. Northcutt.)

Q. What steps did you take in response to these instructions or statements regarding your participation in the joint submission?

A. We prepared a review of the situation; a statement of the controls exercised by the War Department regarding the employment—prior approval of employment and the establishment of rates, adjustments in rates,—

Mr. Flood: Just a moment, Your Honor. He stated he prepared—what was the answer—a “stipulation”?

The Witness: A submission.

Mr. Flood: A submission. The rest of the answer is just a characterization of what that submission is. That exhibit speaks for itself.

The Witness: Exhibit 35.

Mr. Flood: Exhibit 35 speaks for itself as to what it contains.

The Court: You may continue with your questioning.

Q. (By Mr. Graham): Will you continue with your statement [105] as to what you did?

A. Following the submission of that to Mr. Mechem, we attended a conference of all agencies interested in employment in Alaska.

Q. Which agencies do you mean?

A. Army, Navy, certain private employers, canneries, whose activities had a bearing on the war construction program in Alaska, the War Labor Board, Treasury Department, Chief of Engineers of the Army in Washington; also the various cost-plus-fixed-fee contractors.

(Testimony of Ray H. Northcutt.)

Mr. Flood: Did I understand the witness to say that they attended a conference in Washington?

The Witness: No,—in Seattle; attended by these various representatives from Alaska, Seattle, and Washington, D. C.

Q. (By Mr. Graham): Did you confer with any of the agencies individually? A. Yes.

Q. Which ones?

A. The War Labor Board, the Salary Stabilization Unit of the Treasury Department,—we conferred individually but in company with War Department representatives.

Q. Where did you first go?

A. We first went to the War Labor Board. [106]

Q. What happened there?

A. They were not sure of their jurisdiction. They sent a number of telegrams to Washington, and finally advised us that we had better go to the Salary Stabilization Unit of the Treasury Department.

Q. What did you then do?

A. We went there.

Q. What there happened?

A. Well, the result of that was,—we were subsequently advised that each contractor would have to make——

Mr. Flood: With whom, Your Honor?

A. (Continuing): By the Salary Stabilization Unit of the Treasury Department, Mr. Hallen and Mr. Flemming, I believe. This is back-tracking to some of the conferences that were attended by Tait,

(Testimony of Ray H. Northcutt.)

Noble, Templeton, Ross and so forth, described some time ago.

We were advised that each CPFF contractor, by Hallen and Fleming of the Treasury Department, would have to go to appropriate officials in the headquarters offices of the contractors, namely——

Q. (By Mr. Graham): Of what offices?

A. Headquarters offices, namely, Boston for the West Construction Company, San Francisco for Guy F. Atkinson Company, Boise for Morrison-Knudsen Company, and so on. [107]

War Department representatives protested that that would unduly delay and impede the operations in the Aleutians; that we had already been several weeks attempting to reach some source of authoritative advice in the matter; and that gave rise to this instruction to Guy F. Atkinson Company to make the uniform submission through the attorney, Mr. Mechem.

Q. What then happened?

A. Then getting back to this employment meeting of various War Department, Navy, Treasury Department, War Labor Board,—I believe Wage Adjustment Board,—Department of Labor and contractor representatives that I referred to, held here in Seattle at the New Washington Hotel, about the first of March, 1944, representatives of the War Department came to us—Major Bedell. I believe it was, with Mr. Noble of the War Department in Seattle—and advised us to withdraw the joint submission that Guy F. Atkinson Company

(Testimony of Ray H. Northcutt.)

was making in behalf of all CPFF contractors, including themselves; that the Wage Administration Agency of the War Department would henceforth carry on the solution of this non-manual salary problem.

Q. Referring you to Exhibit 36, will you state what that exhibit is?

A. That is a letter from Guy F. Atkinson Company to the [108] District Engineer, War Department, Seattle, with copies to the interested other CPFF contractors, our Contracting Officers for the War Department and the Chief of the Labor Relations Division of the War Department in Seattle, inclosing all of our data to that date in connection with the joint submission that we had been instructed to make.

Q. Would you refer to Exhibit Number 42, which is in a separate volume, Mr. Northcutt?

A. Yes, sir.

Q. Are you familiar with that document, Mr. Northcutt? A. Yes, sir.

Q. What is it?

A. It is a copy of a Directive from the Contracting Officer, Mr. Noble, to the Chief of the Base Echelon of the Alaskan Department of the Army in Seattle, outlining the policy of the Alaska Department of the Army governing non-manual employees of CPFF contractors. The date of it is the 20th of April, 1944.

Q. Will you refer to the other letter therein contained in such Exhibit 42, being dated April 12th, 1944, and state what that document is.

(Testimony of Ray H. Northcutt.)

A. It is an attachment to this Exhibit Number 42, and is a directive of the War Department, dated the 12th of April, 1944, signed by Col. Hardy, the District Engineer [109] of the War Department in Seattle; also to the Chief Base Echelon of the Alaskan Department of the Army in Seattle, on the subject of approval of the salary schedule of non-manual employees for cost-plus-fixed-fee contractors engaged in the construction of military facilities for the Alaskan Department of the United States Army.

Q. Are you familiar with the various exhibits attached to that letter of April 12th and the supplementary letter of April 20th?

A. Yes, sir.

Q. What are those exhibits in brief?

A. Those exhibits are the results of the approval of the Army Wage Adjustment Agency. They constitute job descriptions of non-manual employees of cost-plus-fixed-fee contractors, the regulations of the War Department regarding overtime payments, base salaries of various groups and the various employment provisions.

Q. Were those the documents which were submitted to the Wage Administration Agency?

A. Yes, sir.

Q. Did you participate in the preparation of these various documents or did you consult with Mr. Noble in the preparation of such documents?

A. I did both. [110]

Q. Briefly, what was the extent of your participation therein?

(Testimony of Ray H. Northcutt.)

A. I assisted with other contractors' representatives in the compilation of the job descriptions and collaborated with other contractors' representatives and government representatives, namely, Contracting Officers and representatives of the Labor Division and Legal Advisers of the War Department in making a uniform compilation of the various jobs that the contractors had to fill or had already filled.

Q. Mr. Northcutt, in these many conferences which you had—as you testified—with the representatives of the War Labor Board, the representatives of the Salary Stabilization Unit and these joint agency meetings in which representatives of all of the various persons interested in employment in Alaska participated, including the Labor Department, were you ever advised at any time that the policies embodied in these submissions were in violation of the Fair Labor Standards Act or any other statute? A. No, sir.

The Court: What did you do, if anything, to keep from violating the Fair Labor Standards Act?

The Witness: Do you mean at this time?

The Court: At any time, this time included. [111]

The Witness: Before we engaged in the War Department contracts we consulted with our own main office and our attorneys, and the National office of the Contractors Association to get information generally as to what work was covered by the Fair Labor Standards Act,—what of our activities

(Testimony of Ray H. Northcutt.)

might be covered by the Fair Labor Standards Act, and were advised that new construction was not covered; that if we were engaged in repair and maintenance of existing structures or facilities, that that would probably be under the Fair Labor Standards Act.

The Court: Is your present statement related only to non-manuals or related to all——

The Witness: Related to all of our construction activities; and that was prior to our engaging in these War Department contracts in Alaska and the Aleutians.

The Court: I am just concerned about them now because I don't believe any other contracts other than those are involved in this litigation.

The Witness: That is correct, sir. In this connection we depended upon the War Department and their Labor Relations Section and their legal advisers to advise us upon the applicability of all regulations in connection with this work,—partly [112] as our own policy and partly because that is specified in our contract.

Every feature of our employment and employment conditions was directed by the War Department representatives. We were given no latitude in that regard and the War Department, we considered, was able and obligated to inform and instruct all CPFF contractors on that problem.

Mr. Flood: I move that be stricken, Your Honor, as a mere conclusion and a matter which it is up to the court to conclude and determine.

(Testimony of Ray H. Northcutt.)

The Court: The objection is overruled.

Q. (By Mr. Graham): In connection with the Court's inquiry, Mr. Northcutt, would you refer to Exhibit Number 21? A. Yes, sir.

Q. What is that document?

A. That is a Directive from the War Department dated June 28th, 1943, signed by Major Templeton, Chief of the Personnel Branch in the District Engineer's office in Seattle, to Guy F. Atkinson Company, with instructions as to interpretation of laws for CPFF contracts.

Q. Mr. Northcutt, will you refer to Exhibit Number 20? A. Yes. [113]

Q. Is that exhibit number 20 the document referred to in the first paragraph of Exhibit Number 21, which was called to your attention?

A. Yes, sir.

Q. Calling your attention to Paragraph numbered I(c) of Exhibit Number 21, which states.

"Since the War Department is responsible for the reimbursement of proper labor costs under these contracts, all such problems will be submitted through the contracting or commanding officer. Such procedure should govern problems under Executive Orders Numbers 9240, 9250, and 9301; Fair Labor Standards Act; Walsh-Healey Act; Davis-Bacon Act; Copeland Act; Eight Hour Law; and other laws or orders, past or future, affecting labor costs."

(Testimony of Ray H. Northcutt.)

I will ask you if you followed those instructions?

A. Yes, sir.

Q. Referring to the submission to the Wage Administration Agency, being Exhibit Number 42, and referring you to Exhibit Number 43, can you state what exhibit number 43 is?

A. Exhibit 43 is a directive from the War Department dated May 3, 1944, signed by J. I. Noble, Contracting Officer, directed to Guy F. Atkinson Company, enclosing [114] rulings of the War Department Wage Administration Agency, covering the non-manual wage structure of contractors for the Alaskan Department of the Army.

Q. Is that approval the document contained in Exhibit Number 16? Would you please examine that.

A. Number 16 is—

Q. Are those the documents, Mr. Northcutt,—that Exhibit Number 16—are those the documents that were attached to and formed a part of Exhibit Number 43 as received by you?

Mr. Flood: I didn't get the question.

The Court: I don't believe the question is accurately stated.

Will you please reframe the question?

Q. (By Mr. Graham): Can you state whether or not the documents embodied in Exhibit Number 16 were the enclosures accompanying Exhibit Number 43?

A. Yes, sir.

The Court: What subject, if you know, did Exhibit 16 relate to?

The Witness: Official rulings of the War Department Wage Administration Agency.

(Testimony of Ray H. Northcutt.)

Mr. Flood: For the record, we wish to object and move to strike the witness' characterization [115] that they are official. That is his conclusion. What they are and what they amount to is for the court to determine.

The Court: Overruled.

Q. (By Mr. Graham): Mr. Northcutt, will you refer to the two major portions of Exhibit Number 16 and indicate generally what they relate to?

A. Well, they relate to the employment policies governing cost-plus-fixed-fee contractors' non-manual employees and the salary structure.

Q. What employees are involved under those rulings, Mr. Northcutt?

A. In Alaska and the mainland headquarters offices of the contractors.

Q. They relate to both the Alaska office and the Seattle headquarters office employees, is that right?

A. That is right.

Q. And those are the rulings in response to the submission, Exhibit Number 42? A. Yes, sir.

Q. Mr. Northcutt, what did you do upon the receipt of these Wage Administration rulings, being those embodied in Exhibit 16?

A. We followed them. [116]

Q. Specifically what did you do,—what changes in pay policies, if any, did you effectuate?

A. I don't know that I follow you, other than that we established the salary ranges provided therein for our own operations in Alaska.

Q. Did you make any retro-active payments?

(Testimony of Ray H. Northcutt.)

A. Yes, sir.

Q. Just what were those?

A. In the main they constituted increases for non-manual employees whose base pay also constituted their gross pay in the case of Group C employees and whose base pay constituted approximately their gross earnings in Group B employees.

The Court: Those retroactive items, did you call them increases or did you call them something else?

The Witness: They were adjustments. We called them adjustments in salaries. They went back to the initial employment under the contract and did not constitute increases as such.

Mr. Paul: Your Honor, at this time I move that the Act contemplates that when the payment is made to an employee, that it be then made upon the basis of some ruling, interpretation, et cetera, as outlined in the statute, and not received later. It is apparent that prior to the receipt of the ruling on May 3rd, [117] that the company had to go back and correct something that they had done previous thereto because they had no ruling upon which to base it or in order to conform to this ruling. It is my contention that prior to the receipt of this ruling that they did not have a ruling.

Mr. Graham: If Your Honor please, I would like to call the court's attention to two things, Mr. Paul's argument directed to the time of payment, it seems to me, is not properly in issue here. That is a discussion as to, under the Fair Labor Stand-

(Testimony of Ray H. Northcutt.)

ards Act, when any right accrues, a matter which has been settled and disposed of by the main judgments in these cases.

As to whatever liability aside from the portal-to-portal act there may have been, it has already been adjudicated substantially in all of these cases with the exception of one or two, I understand are on trial under the merits.

The thing we are interested in here is whether or not the payments or non-payments may be in conformity with the rulings and requirements of an agency of the United States. I don't gather that Mr. Paul's objection has reference to that issue. I called the Court's attention to Exhibits Number 25 and Number 27 [118] previously where the approvals of the Contracting Officer of the War Department were given and also Exhibits Number 14 and Number 15, being Circular Letters heretofore admitted in evidence.

The Court: What about the retroactive aspect of the matter which enters into his objection?

Mr. Graham: I confess I don't know what bearing it has on the matters here, Your Honor.

Mr. Paul: My objection is that the witness' testimony is irrelevant and immaterial upon the issues of this case on the ground that they are attempting to use the exhibit 16, the Abersold Directive, as we commonly call it, as a ruling or interpretation of the administrative agency for wages prior to its receipt.

The witness has testified he had to go back and

(Testimony of Ray H. Northcutt.)

make directions retroactively. Now, if he had to do that, the witness is saying in effect that prior to that time they could not and did not rely upon the Abersold Directive, Exhibit 16.

I would say, therefore, that the reliance of confirmation of the company on Exhibit 16 for wages paid prior to its receipt on May 23rd, 1944, is irrelevant and immaterial.

The Court: Overruled. [119]

Q. (By Mr. Graham): With your retroactive adjustments which were made following your receipt of this Exhibit Number 16, can you state whether or not those payments and each of them were made in conformity with the provisions contained in Exhibit 16?

Mr. Flood: That just calls for a wishful thinking conclusion, Your Honor. We are entitled to know what he did but not his conclusions.

The Court: The objection is sustained. Ask him what occurred in some way more appropriate.

Mr. Paul: I would like a continuing objection to any retroactive confirmation as to Exhibit 16 prior to May 3rd, 1944.

The Court: Is there any objection to that arrangement?

Mr. Graham: No objection.

The Court: Very well. That arrangement may be understood.

Q. (By Mr. Graham): Will you state what you did?

A. We made retroactive payments to all non-

(Testimony of Ray H. Northcutt.)

manual employees, in conformance with the rulings of the War Department Wage Administration Agency.

Q. Referring you to Exhibit Number 48, Mr. Northcutt. A. Yes, sir. [120]

Q. Did you follow the instructions contained in this Exhibit Number 48?

Mr. Paul: Your Honor, may I elaborate upon my objection relating to any testimony conforming or relying upon Exhibit 16 for any wages paid prior to May 3rd, 1944, by calling Your Honor's attention to page 39 of the Interpretative Bulletin, and to paragraph (h).

The Court: You may proceed.

Mr. Paul: Under the Section "Administrative Orders, Rulings, or Interpretations 790.17."

The Court: I have that. You may proceed.

Mr. Paul: (Reading):

"An employer does not have a defense under these two sections"—referring to Sections 9 and 10—"unless the regulation, order, ruling, approval or interpretation on which he relies is in effect and operation at the time of his reliance. To the extent that it has been rescinded, modified or determined by judicial authority to be invalid, it is no longer a regulation or an approval, order, or interpretation.

The thing that is really important, "The Administrator expresses the opinion that [121] the regulations must be in effect at the time of the reliance."

Now, Exhibit 16 admittedly did not come into their hands until May 3, 1944. How then can they

(Testimony of Ray H. Northcutt.)

rely upon that document for wages paid prior thereto? And any testimony about his confirming or relying upon it is entirely irrelevant because by his own admission he didn't receive it until May 3rd.

Mr. Graham: I would just like to call the Court's attention to the fact that the payments weren't made until May 3rd. There were existing approvals, as were testified here to with respect to the various circular letters, the contract, the Contracting Officer's instructions, all of which served as the basis upon which payments were made prior to May or June, whatever date these were placed into effect.

The portion of the administrative bulletin from which Mr. Paul reads states that the ruling shall be in effect at the time at which the payment is made. That is precisely what the witness has testified to here. There was no authority prior to May for the making of any of these adjustments, or the making of any increases, making payment of any increases. It was not until this approval came through that the contractors could make the payments of the increases for which they [122] had been seeking these approvals over the course of months. I don't see what Mr. Paul is driving at. Perhaps I am—

The Court: The situation seems to be one not where the payment was made and then justified by a later ruling or directive of the War Department but where a present retroactive payment was made

(Testimony of Ray H. Northcutt.)

upon the presently existing directive of the character mentioned. Is that not the situation, Mr. Paul?

Mr. Paul: If the Abersold Directive, Exhibit 16, is offered merely for the purpose of justifying payment, then, of the retroactive payments covering work prior thereto, perhaps my objection is not as well founded as I thought it was. My objection is that the base compensation paid prior to May 3rd cannot be justified by Exhibit 16, and that I understood the offer was for.

Mr. Graham: I don't offer the exhibit as a basis for reliance upon something which is in existence. The exhibit has been offered to substantiate—certainly the reliance so far as the defendants were concerned for the conformity of their policies to those embodied in the exhibit and the payment of all wage payments thereafter and at the time of the receipt of the document. There is other ample justification for [123] the wage payments made prior to May on the basis that was then established.

The Court: At this point we will take the noon recess. We will be recessed until the usual time—until 2:00 o'clock.

(At 12:10 p.m., Tuesday, December 9, 1947, proceedings recessed until 2:00 p.m., in the United States Court House.) [124]

Seattle, Washington

December 9, 1947, 2:00 o'clock, p.m.

(All parties present as before.)

RAY H. NORTHCUTT—(Resumed)

Direct Examination—(Continuing)

Mr. Paul: I have a further objection to the question which is before the witness.

(Last question and answer repeated by the reporter as follows:

“Question: Referring you to Exhibit Number 48, Mr. Northcutt.

“Answer: Yes, sir.

“Question: Did you follow the instructions contained in this Exhibit Number 48?”)

Mr. Paul: I would like to make a further objection on the ground that the Abersold Directive, Exhibit Number 16, to which the question refers is on its face not a regulation, order of approval, ruling, or interpretation of an administrative agency [125] within the contemplation of Exhibit 9 and Exhibit 11 of the Portal to Portal Act.

Mr. Graham: Let me call your attention, Counsel, to the fact that the question is directed to Exhibit 48 which is not the Abersold.

Mr. Paul: Which is Exhibit 48?

I beg to differ with Counsel. The Abersold Directive is the underlying directive or the directive which is the basis of Exhibit 48.

Mr. Graham: I am sorry but I don't have my copy. I understood you to say that the question involved the question related to the Abersold Directive. I didn't intend it to.

Mr. Paul: Exhibit 48 reads, in part:

“Effective immediately, classifications of non-

(Testimony of Ray H. Northcutt.)

manual employees, wage rates and ranges for CPFF contracts, per schedule approved by the War Department Wage Agency over signature of John R. Abersold by letter to the Commanding General, Alaskan Department, dated 27 April 1944"—and so forth.

In other words, the Exhibit 48 is cumulative certainly and is based upon Exhibit 16, the Abersold Directive. My objection relates to Exhibits 48 and [126] 16. I will state them.

The ground is that the Abersold Directive and all documents relating to it are immaterial and irrelevant to this case because the directive—the asserted directive is not such a one as is contemplated by Section 9-11. They are, on its face, issued pursuant to Executive Order 9250, which is the Executive Order creating the National War Labor Board and the Wage Stabilization.

The National War Labor Board was first created in January, 1942, by Executive Order 9017, which specifically has a clause in it reciting as follows,

“Nothing herein shall be construed as superseding or in conflict with the provisions of the Fair Labor Standards Act.”

The next pertinent legislation on wage stabilization is Section 4 of the Wage Stabilization Act of 1942, dated October 2, 1942—again the basis for the Abersold Directive—which in Section 4 recites as follows,

“No action shall be taken under authority of this Act with respect to wages or salaries, 1,

(Testimony of Ray H. Northcutt.)

which is inconsistent with the provisions of the Fair Labor Standards Act as amended."

Executive Order 9250 was issued the next day, October 3, 1942, and it too contains the following language:

"Nothing in this order shall be construed as affecting the present operation of the Fair Labor Standards Act."

The next pertinent legislation on wage stabilization is the War Labor Disputes Act, Act of June 25th, 1943, Chapter 14450, USCA Appendix, Section 1567, Section 7A2 of the War Labor Disputes Act provides,

"In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act."

Now, what they are trying to do is to dignify this Abersold Directive, which on its very face was issued pursuant to a statute which forbade the agency from varying the requirements of the Fair Labor Standards Act. They are using this as an excuse for the evasion and every time Congress and the President spoke on the subject it specifically forbade the agency from setting wage rates different than required by the Fair Labor Standards Act, where the Fair Labor Standards Act was applicable to the particular individuals. I submit this is a matter of [128] law.

Any action by the Stabilization Agency cannot be excused to violate the Fair Labor Standards Act because of its specific provisions contained in

(Testimony of Ray H. Northcutt.)

it. I therefore object to the question on the ground that it is wholly irrelevant and immaterial.

Mr. Graham: May I be heard, your Honor?

The Court: You may.

Mr. Graham: It is my understanding from Counsel's objection, that he objects to any line of inquiry relating to rulings, approvals, regulations, or orders which according to counsel's contention now turn out to be in derogation or in violation of the Fair Labor Standards Act. If Counsel's position is taken, the Portal to Portal Act is absolutely meaningless. The whole intent and purport of the Portal to Portal Act obviously is to exonerate from liability under the Fair Labor Standards Act those defendants who have relied in good faith on orders which confessedly turn out to be in violation of the Fair Labor Standards Act. We could not be here before this court were that not the situation.

Mr. Paul: The Portal to Portal Act could reach many and many another situation where the authority under which they were issued was not [129] specifically forbidden—affirmatively — to circumvent the Fair Labor Standards Act. There are many other factual situations in the Portal to Portal Act which have real meaning. For example, the Alaska-Juneau Gold Mining Company case which the Supreme Court considered, the defenses there are based upon the assertions of the Administrator of the Wage and Hour Division, himself, as he interpreted the law. That is a wholly

(Testimony of Ray H. Northcutt.)

different factual situation than we have here, where the authority on its face—the Abersold Directive says,

“Pursuant to Executive Order 9250.”

A simple reading of 9250 says,

“Nothing herein contained shall be construed as affecting the Fair Labor Standards Act.”

So I believe Counsel’s argument is not sound.

The Court: I understand this defense created by the statute of 1947, the Portal to Portal Act involves primarily a state of mind and attitude of the defendant employer.

In the case of a corporation that will involve, of course, the attitude of the policy-making officials of the corporation. I do not undertake to note what differences there may be as between civil and criminal cases on this matter or issue of good faith, but the [130] Congress in passing the Portal to Portal Act, in creating the good faith defense, did not expressly distinguish defenses of that nature in a civil case from a defense of good faith in a criminal case.

It seems to me that whatever is probative on the question of the defendant employer’s actual attitude concerning a bona fide effort to comply with the law may properly be shown under that issue. So here I feel that the court should overrule this objection and it is so ordered.

Mr. Paul: May we have a continuing objection to any matter relating to stabilization, the Abersold Directive, and any document or testimony

(Testimony of Ray H. Northcutt.)

based upon any directive or ruling of a stabilization agency?

Mr. Graham: I have no objection to a continuing objection.

The Court: The court approves of that and it is so ordered.

Mr. Flood: May the record show that we join in the objection, and we specifically and particularly object to any construction that Section 9 predicates the finding of good faith merely or purely upon a subjective state of mind—an internal state of mind. I am not sure that the court meant to say that but at least I am making my— [131]

The Court: Whatever the attitude is, whether it is subjective or objective, anything that may be fairly said to be material as evidence on that point is all the court meant to say. I wasn't thinking of subjectives. I was thinking of any evidence that does tend to reflect the actual attitude of the defendant employer with respect to his acts with reference to the Fair Labor Standards Act may be shown. The Court approves of the arrangement Mr. Flood suggested by preserving his objection of record.

Mr. Graham: I believe, your Honor, the stipulation so provides—that any objection by any counsel may be reserved.

The Court: I believe that is so.

Mr. Graham: Mr. Reporter, will you read the question pending?

(Testimony of Ray H. Northcutt.)

(Last question repeated by the reporter as follows: "Question: Did you follow the instructions contained in this Exhibit Number 48?")

A. Yes, sir.

Q. (By Mr. Graham): Mr. Northcutt, will you please refer to Exhibit Number 24? [132]

A. I have it.

Q. Prior to the receipt of this letter which is dated October 29, 1943, what were the pay and overtime policies of the company in so far as they related to the non-manual employees and Class B employees in the Seattle office?

A. Class B employees were expected to work—were required to work any reasonable number of hours, six days per week, and were paid overtime for the seventh day. Their salaries were based—their base salaries covered their earnings for a basic 44-hour week—that is, a total of 44 hours, five and a half days.

Q. What did you do following receipt of this document, Exhibit Number 24?

A. Following some inquiry to the War Department as to the mechanics of carrying it out—that is, for additional instructions—we placed it into effect; and converted our salaries in the Seattle office from a basic 44-hour week to a basic 40-hour week, in accordance with the prescribed formula.

The Court: Contained in what if anything.

The Witness: Contained in Exhibit 24.

Q. (By Mr. Graham): Now, will you refer to

(Testimony of Ray H. Northcutt.)

Exhibit Number [133] 41? A. Yes, sir.

Q. What were the circumstances to which this Exhibit Number 41 relates?

A. Exhibit 41 is a letter from the War Department, Major Tait, Contracting Officer, Chief of the Alaskan Division, to the National War Labor Board, referring to a letter from the War Labor Board to Guy F. Atkinson Company, dated the 20th of December, 1943. The War Labor Board advised us that—

Mr. Flood: Just a moment. If it is in writing, we are entitled to the writing.

The Court: In what form?

The Witness: The War Labor Board sent us a letter which—

The Court: You can say what subject the letter mentioned but you cannot say what was said by the letter, over the objection of plaintiff.

A. (Continuing): The letter from the War Labor Board dealt with the—

Mr. Flood: Just a moment, your Honor. If he is going to testify with regard to the letter at all, we are entitled to have the letter.

The Court: He may say what the subject of the letter was without stating what the letter said [134] on that subject.

A. (Continuing): The War Labor Board letter to Guy F. Atkinson Company of the 20th of December, 1943, dealt with the company's application of this salary confirmation formula.

Q. (By Mr. Graham): Will you refer to Exhibit Number 74, Mr. Northcutt?

(Testimony of Ray H. Northcutt.)

A. Yes, sir.

Q. What is Exhibit Number 74?

A. Exhibit Number 74 is a letter from Guy F. Atkinson Company to the War Department District Engineer's Office dated December 23rd, 1943, and the subject is "Salary Confirmation Seattle Office Employees, 44-hour basic week to 40-hour basic week."

Q. Does that document in the first paragraph thereof refer to Exhibit Number 24?

A. Yes, sir; it does.

Mr. Flood: Your Honor, I object to any testimony whatsoever with reference to it unless it be offered and admitted. I have no objection to its being admitted if offered.

Mr. Graham: All right. I will offer it.

The Court: Which number is that?

Mr. Graham: Exhibit Number 74, your Honor, [135] has not previously been offered by the defendants.

The Court: Whose exhibit is it—plaintiffs' or defendants'?

Mr. Graham: It is listed as a defendants' exhibit, your Honor, as a conditional document to follow the plaintiffs' case. However, we desire to offer it at this stage of the proceedings.

Mr. Flood: Before your Honor calls upon us, may we read it?

The Court: You may have a chance to inspect it.

Mr. Flood: No objection.

(Testimony of Ray H. Northcutt.)

The Court: Defendants' Exhibit 74 is now admitted.

(Defendants' Exhibit 74 received in evidence.)

Q. (By Mr. Graham): Mr. Northcutt, how many enclosures are contained in Exhibit Number 74, said enclosures being the documents sent to the District Engineer by the Guy F. Atkinson Company as enclosures with this letter dated September 23rd, 1943, being the first two pages of Exhibit 74?

A. There are two enclosures.

Q. What are they? [136]

A. One is a letter dated December 20th, 1943, from the 12th Regional War Labor Board to Guy F. Atkinson Company, and the other is a letter dated December 22nd, 1943, from Guy F. Atkinson Company to the War Labor Board in Seattle.

Q. Referring to the enclosure in Exhibit 74, being the letter to the company from the 12th Regional War Labor Board, dated December 20th, 1943, can you state what relationship there was between your carrying into effect the instructions contained in Exhibit Number 24 and these complaints which are referred to in the letter of December 20th?

Mr. Paul: May I have that question read, please?

The Court: You may.

(Last question repeated by the reporter.)

A. The complaints referred to in the War Labor Board letter of December 20th, 1943, result from the application of the confirmation formula

(Testimony of Ray H. Northcutt.)
directed in Exhibit 24. The application of the formula in some circumstances made a few cents per week difference in the—

Mr. Paul: I move that that last portion be stricken as not responsive. [137]

The Court: It is stricken.

Q. (By Mr. Graham): What was the basis of these complaints, Mr. Northcutt?

Mr. Flood: Were these complaints verbal or in writing? If they were in writing, we are entitled to have the writings.

The Court: Sustained.

Q. (By Mr. Graham): Were complaints made to the company at that time on or about December 20th or prior thereto?

A. Verbal complaints, yes.

Q. What were those complaints and by whom were they made?

A. The complaints were made by certain employees to the effect that the result of application of this confirmation formula in some instances amounted to a small decrease in gross pay. We received no written complaints from employees. The War Labor Board letter of December 20th was the first written complaint.

Q. Referring to Exhibit Number 41 as indicated a copy of this letter was sent to the Guy F. Atkinson Company, is that correct? A. Yes, sir.

Q. After the letter from Major Tait, Chief of the Alaska Division of the United States Engineer Department, being [138] Exhibit Number 41 — after this letter to the National War Labor Board,

(Testimony of Ray H. Northcutt.)

were there any further communications to you from the National War Labor Board?

Mr. Paul: I object on the ground that that is 'way beyond his knowledge, not only that, but it is immaterial and irrelevant. It doesn't prove or disprove anything.

The Court: Have you any response to that objection?

Mr. Graham: I don't know that it needs any response, your Honor.

The Court: I have just asked if you wanted to make any response.

Mr. Graham: I think counsel misunderstood my question or maybe I didn't state what I intended to. I asked if the company or he had received any communications from the War Labor Board regarding the subject matter of this document Number 41 and these two documents concerning which we have just inquired.

The Court: The objection so far as your question relates to the company is sustained in its present form. But so far as his receiving any after that, he may now answer.

Mr. Graham: I will withdraw the question. [139]

Q. (By Mr. Graham): Did you receive any communication, Mr. Northcutt, in your capacity as an officer of the Guy F. Atkinson Company, or otherwise, from the National War Labor Board, with reference to the subject matter which is set forth in Exhibits numbered 41 and 74?

A. No, sir.

(Testimony of Ray H. Northcutt.)

Q. Did the company receive any communications, to your knowledge? A. No, sir.

The Court: That ought to be conditioned "if he knows."

Mr. Graham: May the reporter read the question? I think I so conditioned it, your Honor.

(Last question repeated by the reporter.)

The Court: "To your knowledge."

You may answer. A. No, sir.

Q. (By Mr. Graham): Mr. Northcutt, will you refer to Exhibit Number 39? A. Yes, sir.

Q. Are you familiar with that letter, Mr. Northcutt? A. I am.

Q. Were you familiar with the subject matter of that letter [140] at the time it was written by Mr. E. B. Skeels, the job manager for your company? A. Yes, sir.

Q. Did you discuss the subject matter of this letter with Mr. Skeels? A. I did.

Q. What were the subject matters which prompted this letter of Mr. Skeel's, being Exhibit Number 39?

A. We believed that the possible construction or interpretation of a reasonable number of hours for these Group B employees might afford us relief from the inequitable salary gross earning condition with which we were faced. In other words, if a reasonable number of hours could be construed to be eight hours, then these employees would be eligible for overtime payments as prescribed by the War Department regulations, and

(Testimony of Ray H. Northcutt.)

adjustments in the base salaries which was then the subject of serious consideration would be altered by such an interpretation.

Q. If you had been authorized to pay overtime to these non-manuals, as requested in this Exhibit Number 39, would the application for submission to the Stabilization agencies have been necessary?

Mr. Flood: Just a moment. That calls upon this witness to construe the statutes of the United [141] States together with various regulations. It is purely a question of law for the court to determine and not one for the witness.

Q. (By Mr. Graham): What was your understanding, Mr. Northcutt, with respect to the same?

The Court: That question will be regarded as having been objected to, the same as the other one, and the objection to the latter form is overruled.

Mr. Paul: I will add a further objection, your Honor, that it is clearly and patently self-serving as to what he then thought, as now related.

Mr. Flood: I also submit, your Honor, that an understanding, even though erroneous, doesn't evidence good faith.

The Court: The objection is overruled.

A. Our understanding was that if this interpretation were determined to be valid, then the War Department regulations by which our pay practices were governed would enable us to pay overtime to the employees working this "reasonable number of hours" without overtime.

Q. (By Mr. Graham): If I understood your

(Testimony of Ray H. Northcutt.)

testimony this morning, you stated that on 7100 everybody had [142] been working an 8-hour day.

A. Yes.

Q. And on Contract 202, they were working a 10-hour day, is that right?

A. That is right.

Q. Do I understand you to state that if you had been authorized to pay the overtime for the additional two hours there would have been no need for the adjustment of base salaries?

A. In this particular group B there would not have been any necessity for adjusting the base salaries of Group B.

Q. Calling your attention to the next to the last sentence contained in this Exhibit Number 39, which states: "For the additional two hours per day we believe the non-manual employees are entitled to overtime payments in conformity with the provisions of the job contract and Executive Order 9240" I will ask you whether or not that statement was based on any belief that the non-manual employees there referred to were subject to the Fair Labor Standards Act and you were therefore required to make those overtime payments for which the request was made?

A. We did not believe they were subject to the Fair Labor Standards Act. [143]

Q. Did this document have any reference whatsoever to the Fair Labor Standards Act?

A. None whatever.

The Court: What employees were you thinking of when you made your next to the last answer?

(Testimony of Ray H. Northcutt.)

The Witness: Group B non-manual employees are dealt with exclusively in that group.

The Court: None of the Group B non-manuals were subject to the Fair Labor Standards Act?

The Witness: We didn't believe that any of the non-manuals were subject to the Fair Labor Standards Act.

The Court: For my own convenience I am trying to get what you said with respect to the Fair Labor Standards Act not applying in your next to the last answer which I spoke of a moment ago.

Does that refer to Group B or the non-manuals or to anybody else?

The Witness: That refers to Group B non-manuals.

Q. (By Mr. Graham): Did you receive a response to this Exhibit Number 39?

A. Yes, sir.

Q. Calling your attention to Exhibit Number 40, in this the response received by the company to that inquiry [144] in Exhibit 39?

A. It is.

Q. Following your inquiry embodied in Exhibit 39, were you granted or denied the authority to pay overtime?

Mr. Flood: Exhibit 40 is said to be a responsive speech for itself, your Honor.

The Court: This question is with regard to Exhibit 39.

Mr. Flood: Yes. And Exhibit 40 speaks for itself. I think it is a denial, is it not?

(Testimony of Ray H. Northcutt.)

Mr. Graham: Yes.

Mr. Flood: It speaks for itself.

The Court: That objection is sustained.

Mr. Graham: I would like the authorization, your Honor, to read into the record the second paragraph of this Exhibit Number 40 which states: "Payment of overtime compensation to Group B non-manual employees would be in violation of Executive Order Number 9240. For the payment of overtime, Government Regulations define Group B employees as follows: 'Group B employees will be expected to work any reasonable number of hours, six (6) days per week without payment of additional compensation.' "

The Court: That last was Group B?

Mr. DeGarmo: Group B. [145]

Mr. Flood: May I inquire that in view of the stipulation is either party free at any time we wish to read into the record any portion of these voluminous exhibits or was the stipulation to take the place of enlarging the record with that process?

Mr. Graham: I don't know if there is any prohibition in the stipulation of reading such.

Mr. Flood: All right. I thought that was the function of the stipulation was to relieve the record to that extent.

The Court: You may proceed.

Q. (By Mr. Graham): Referring, Mr. Northcutt, to Exhibits Number 29 and Number 37.

A. Yes, sir.

(Testimony of Ray H. Northcutt.)

Q. Can you state whether or not, Mr. Northcutt, all changes in compensation rates, pay policies and other related matters were or were not submitted in each and every instance to the Contracting Officer for approval.

Mr. Flood: I object to that. That calls upon this witness by saying yes to such a question to get into the record a sweeping conclusion.

The Court: Sustained. You may ask an appropriate question. [146]

Q. (By Mr. Graham): What is Exhibit 29, Mr. Northcutt?

A. Exhibit 29 is a letter from Guy F. Atkinson Company to the War Department Engineer, dated January 19th, 1944. It deals with a request for additions to the organization schedule and salary schedule.

The Court: A request for what?

The Witness: Approval of additions to the organization schedule and salary schedule.

Q. (By Mr. Graham): What is Exhibit Number 37?

A. Exhibit 37 is a similar request for other additions to the organization and salary schedule from Guy F. Atkinson Company to the War Department District Engineer, dated March 8th, 1944.

The Court: Does your term of "additions to the schedule" — meaning employees' schedule — mean requests for additional personnel of the type or kind of classification in question or does it not mean that?

(Testimony of Ray H. Northcutt.)

The Witness: Yes. It means additional classifications, additional positions.

The Court: And that means additional personnel—an added number of employees, does it not?

The Witness: Yes; not previously covered.

The Court: Proceed. [147]

Q. (By Mr. Graham): What was the procedure of the company, Mr. Northcutt, with respect to additions to the salary schedule?

Mr. Paul: I object on the ground that the question is not related to this law suit. This law suit and the defenses arises under the Portal to Portal Act relate to the act or omission complained of by the plaintiffs. The act or omissions complained of by the plaintiffs relates to Section 7 of the Act. This is the same objection Miss Krug made yesterday.

Section 7 relates to commerce, to rates of pay for overtime. What counsel is attempting to do is to show that they complied with something else, so therefore they complied with overtime.

The Court: The question is: Is it relative? Have you any response?

Mr. Graham: Yes, your Honor. It certainly seems to be the subject of this inquiry as to whether the defendant company acted in good faith. We submit it is material to establish that this defendant company operated in all matters with respect to the establishment of rates, salary classifications, overtime policies, all matters of pay policies, strictly in accordance with their submissions and approvals by [148] the War Department.

(Testimony of Ray H. Northcutt.)

Miss Krug: Your Honor, I completely fail to see how their compliance with a wage rate schedule or with an organizational chart or any other type of unchallenged regulation or ruling or instruction of the War Department has any tendency whatsoever to show good faith with respect to their compliance with another instruction of the War Department relating to overtime.

Mr. Flood: We add the ground for our objection that compliance with the Wage Stabilization Act or the Bacon-Davis Act with reference to a field organization at Laporte, Indiana, has no relevancy to any omission to pay overtime on the job-site at Alaska, on the ground that things done among other people at other times and places are not competent to prove any probative fact with reference to another and different particular issue.

The Court: I think I need to hear you further, Mr. Graham.

Mr. Graham: Counsel has raised the issue as to whether the actions in good faith of the defendants in all of their other operations, in whatever they did, is of any probative value in establishing the fact that they operated in good faith in so far as [149] the particular matter of overtime compensation of the claimants may be involved. After all, as the interpretative bulletin of the Administrator sets forth, the good faith of the defendants is to be established by all of the surrounding circumstances. We submit that their practices and policies with respect to their pay, organization

(Testimony of Ray H. Northcutt.)

schedules, pay schedules and policies are material to the issue of their good faith in their operations.

The Court: Do you mean to say in effect no matter whether the employees were in Laporte, Indiana, or in Alaska, or Seattle?

Mr. Graham: Where the employees may be involved seems to me to be immaterial in testing the good faith of the company in its operations pursuant to the War Department directives.

Miss Krug: Your Honor, there is only one act or omission complained of in this entire law suit and that is the failure to pay overtime to certain specific plaintiffs working on certain specific jobs in Alaska. What the defendants may have done with reference to any other acts or omissions instructed by the War Department or not instructed cannot have any bearing whatever upon whether they acted in good faith in complying with regulations which are admittedly [150] invalid. They are attempting to establish that in compliance with completely unchallenged requirements that they acted in good faith in complying with requirements that are admittedly illegal. I don't see that the one follows from the other.

Mr. Graham: If your Honor please, I would like to call the Court's attention also to the stipulation requesting the reservation of ruling on all of these exhibits with the stipulation that the testimony offered shall be received subject to whatever reservation of ruling may be made by the court with respect to these various documents.

(Testimony of Ray H. Northcutt.)

Mr. Flood: We are not talking about documents. We are talking about the testimony from the witness on the witness stand here. It comes down to this, your Honor, that conceding *arguendo* there may have been good faith—we don't need to inquire into it—it is an irrelevant issue—with regard to the wages in Laporte, Indiana, it proves nothing under the Fair Labor Standards Act with reference to the employees in Alaska.

Mr. Graham: These documents and each of them relate to the operations of the defendant pursuant to Contract 202 which is the precise contract in the operation of the defendant here under consideration. [151]

The Court: Is it your contention that whatever was done at Laporte, Indiana, in the connection now inquired about was connected with the operations in Alaska?

Mr. Graham: That is correct, your Honor; and the documents will reveal that to be the case. But I don't understand that to be the objection of Counsel.

Mr. Paul: No, the witness has been asked to relate some version of Exhibits 29 and 37. When you look at 29 and 37, they talk about a superintendent and an assistant superintendent and there isn't a single thing about overtime in it,—nothing about overtime. We look at Exhibit 37, and there again where is the overtime proposition or exemption? It is wholly irrelevant whether they had its adoption or not. It is not a part of this law suit.

(Testimony of Ray H. Northcutt.)

Mr. Graham: I propose to establish by this witness what the overtime policies were, with respect to these employees.

Mr. Flood: Which employees?

Mr. Graham: Subject to these documents that we are here inquiring about.

Miss Krug: Do you mean by these documents 29 and 37 that you intend to establish the overtime [152] policies of the defendants with respect to employees at Laporte, Indiana.

Mr. Graham: It will be shown by the witness that the overtime policies which they followed and pursued were consistent throughout.

Miss Krug: The same objection. We are only interested in the parties plaintiff to this suit.

Mr. DeGarmo: I might make this observation, if your Honor please: I can conceive of a situation where counsel for the plaintiffs might take an entirely opposite view from the one they are now urging upon the court. Let us assume that instead of these documents showing a compliance in Laporte, Indiana with the general practices which have been testified to here, that they showed a deviation from that and in fact showed that they had at Laporte, Indiana done the very thing which the plaintiffs state we should have done in Alaska, I don't believe that for one second these plaintiffs would insist or object,—would insist that that had no relation to the question of good faith upon what they did in Alaska. I don't think you can divorce good faith by geography. You can't say that be-

(Testimony of Ray H. Northcutt.)

cause a man has good faith in Seattle, that he has good faith in Everett or Tacoma or some place else; or vice versa, you cannot say that if he had bad [153] faith in Tacoma that he can have good faith in Tacoma upon an identical subject. That is the basis here. We are attempting to show that with respect to all matters pertaining to this contract this defendant—as all defendants did—exercised the same good faith with respect to overtime policies. They were consistent. They followed the directives of the War Department.

The Court: The court will rule, overruling the objection.

Mr. Paul: There again, your Honor, we would like to have a continuing objection that any testimony and any documents which does not relate to interstate commerce or to overtime as such is wholly irrelevant and immaterial to this case.

Mr. Graham: If your Honor please, I am not sure I understand what interstate commerce has to do with this law suit. The matters of coverage of the Fair Labor Standards Act were decided in the case upon the merits. We are here testing the good faith of the defendants in following the various instructions.

The Court: Counsel may have a continuing objection. Proceed. [154]

(Last question repeated by the reporter as follows: “Question: What was the procedure of the company, Mr. Northcutt, with respect to additions to the salary schedule?”)

(Testimony of Ray H. Northcutt.)

A. Our procedure, whenever the undertaking of additional work under the contract required the employment of classifications not previously authorized and salary schedules not previously authorized, was to submit such additions for approval,—and this was a requirement of the provisions of our contract, such submission.

We were not allowed to employ anyone or to pay any salary or make changes in any salary or method of computation of salary or overtime without the prior approval of the War Department in all cases.

Q. (By Mr. Graham): What were the overtime compensation provisions utilized by the company with respect to these employees?

A. As set forth in the individual employment contracts which were made a part of our prime contract.

Q. Did they conform to the provisions of Circular Letter Number 2236?

Mr. Flood: That is a conclusion. The contract [155] speaks for itself and so does the circular. They are both in evidence. I object to the question.

The Court: Sustained.

Mr. Graham: I withdraw the question.

Q. (By Mr. Graham): Referring to Exhibit 38, can you state what reference that document has to Exhibit 37?

A. Yes, sir. Exhibit 38 constitutes War Department approval of the submission in Exhibit 37.

Q. Referring to Exhibit 31, can you state what reference that document has with reference to Exhibit Number 29?

(Testimony of Ray H. Northcutt.)

A. Exhibit 31 constitutes War Department approval of the submission in Exhibit 29.

The Court: Would you like to take a recess at this time?

Mr. Graham: I think it would save some time, your Honor.

The Court: Court is in recess.

(Recess.)

Q. (By Mr. Graham): Mr. Northcutt, was there a legal staff in the office of the District Engineer? A. Yes, sir.

Q. Did you consult members of that staff with reference to problems arising under the contract?

A. Yes, sir.

Q. What was the Labor Relations Section of the Corps of Engineers of the Chief's office?

A. Do you mean locally in Seattle?

Q. Local and—if you know—in Washington?

A. They were established both in Washington and Seattle. They exercised approval.

Mr. Paul: What was the question?

The Witness: What was the Labor Relations Section of the War Department?

Mr. Paul: I object to the answer as not being responsive. Further, I object to it as not being the best authority. If there is authority, it was laid down by departmental regulations and not the statements of this witness.

The Court: Read the question, Mr. Reporter.

(Last two questions and answers repeated by the reporter.)

(Testimony of Ray H. Northcutt.)

The Court: The objection is sustained. There is no question outstanding that calls for that. You can ask him what as a matter of practice they considered and acted upon.

Mr. Graham: My first question was preliminary. I asked him what they were so that they might be identified to the court. [157]

Q. (By Mr. Graham): What was this Labor Relations Section which you speak of, Mr. Northcutt?

A. It was a division in the office of the War Department, District Engineer's Office in Seattle; and a division in the office of the Chief of Engineers in Washington, D. C.

Q. Did you or the officer of the company consult with this section? A. Yes.

Q. In reference to what matters?

A. For advice and approval of all matters pertaining to Labor Relations, manual and non-manual.

Q. Were there attorneys on the staff of the Labor Relations Section of the War Department?

A. There were attorneys, yes, in the Seattle office of the District Engineer, to my knowledge. I mean to say I had personal contact with those in Seattle. And of course there were those in Washington that I did not have personal contact with until later.

Q. What reliance, if any, did the Guy F. Atkinson Company place upon the provisions contained in Circular Letter Number 2236, Circular Letter Number 2390, and the rulings of the War Department Wage Administration Agency—

(Testimony of Ray H. Northcutt.)

The Court: I think you had better let him [158] answer one of these.

Mr. Flood: I think the objection to one is just as valid as the objection to all because it merely permits this witness to say by wishful thinking "We relied" and that is the end of it. "We placed the utmost reliance" I presume he is going to say. That is just what the court is going to pass judgment on. It is within the province of this court to make such a finding and not this witness. Yet he relies upon this witness who has such an interest in this matter to lay down a judgment which the court is going to have to accept. I think it is incompetent, irrelevant, and immaterial because it calls upon this witness for a self-serving and wishful thinking conclusion.

The Court: I think in this particular instance the objection should be sustained. The witness should be given an opportunity, if you wish to let him have it, on proper questions to indicate what if anything he did with reference to these advices.

Q. (By Mr. Graham): Mr. Northcutt, what reliance if any did the Guy F. Atkinson Company place upon Circular Letter Number 2236 in the establishment of its overtime pay policies?

Mr. Flood: The same question and the same objection. [159]

The Court: Sustained. You can ask him what if anything he did in pursuant thereof or subsequent thereto.

Mr. Graham: If your Honor please, to shorten

(Testimony of Ray H. Northcutt.)

what might be a rather lengthy series of questions to which I assume an objection would be entertained on the part of counsel for plaintiffs, I would like to make an offer of proof to establish by the witness on the stand that the Guy F. Atkinson Company relied upon each and all of the documents offered—being Exhibits 13 through 67—and in particular upon Circular Letter Number 2236, Circular Letter Number 2390, the Abersold Administration rulings, and instructions embodied in these various other documents,—relied upon such documents in the formation and carrying into effect and the carrying out of their wage and salary policies and in particular the overtime policies and payments of the company with respect to non-manual employees and in particular the Class B non-manual employees here in question.

Mr. Flood: We do not object to any testimony from this witness as to what the Guy F. Atkinson Company did. We do, however, object to the so-called offer. I feel, your Honor, that any offer to be competent must state the question and must state what [160] counsel expects the witness to answer with respect to such question before its competency can be entertained. I think the question therefore is objectionable in form.

In any event, we also object on the grounds stated as objections to the previous questions.

The Court: The objection to the form of the question is sustained without prejudice to the examiner's right to proceed by proper form of ques-

(Testimony of Ray H. Northcutt.)

tions to find what if anything was done by the witness or other principals in policy-making authority in his company touching these matters.

Mr. DeGarmo: May I make a comment, if your Honor please. One of the requirements of the Portal to Portal Act is that the acts of the defendants must have been in conformity with and reliance upon certain documents. Now, the proof in a case could very well fail entirely by showing that certain things were done. You might show that certain things were done and that certain documents were over there, outlining the very thing which was done. But if there was no proof that the thing which was done was in reliance upon the instructions to do it, then you have no situation which comes within the Portal to Portal Act. The Act requires and specifies that it must not only be in [161] conformity with but it must be in reliance upon. It might be a pure coincidence that what was done coincided with something over here which was instructed to be done and there might have been no reliance upon that particular document at all.

The question which was asked of this witness was whether they did in fact rely in what they did; not what they did but whether they relied in what they did upon the thing that was in these documents. I believe, if your Honor please, that that is not only a proper but a very material question which your Honor must find and upon which this witness has to testify. He has already testified what they did. He has testified they followed cer-

(Testimony of Ray H. Northcutt.)

tain procedures which were outlined in these documents.

The question is: Did they do it in reliance upon these documents or in reliance upon something else? Whether they did it is one thing, but why they did it is another. That is what the Portal to Portal Act says we must show.

The Court: The ruling will stand.

Mr. DeGarmo: May I make the offer of proof, if your Honor please, with Mr. Graham's consent?

The Court: You may do so.

Mr. DeGarmo: If your Honor please, at this time [162] we would like on behalf of the defendants to make this offer: that if the witness was permitted to answer the question as to what if any reliance he placed—that is the defendants placed—Guy F. Atkinson Company and others—upon the circular letter number 2236, Circular Letter Number 2390, the Abersold directives, and the other instructions and directions from the United States War Department as contained in the various exhibits which are a part of this record, being Exhibits Numbers 13 to 67—I think it is—inclusive, that he would testify that the acts and things which he has related from the stand in his testimony already as having been done by the Guy F. Atkinson Company were done in reliance upon such documents.

Mr. Flood: Objected to, your Honor, as being incompetent, irrelevant and immaterial, and precisely upon the grounds stated as objections to the

(Testimony of Ray H. Northcutt.)

former questions, and specifically because it calls upon this witness to answer by conclusion a question which assumes the very issue here in controversy, an issue which is both a mixed issue of law and fact for the court to find; that it does not call upon this witness to testify with regard to an ultimate fact but merely to characterize the whole issue by one self-serving and [163] wishful thinking answer of his own. We are bound here only by ultimate facts and what the parties did, and the inferences that are to be drawn from what the parties did are for the court to find and not for this witness to brand or characterize in accordance with his own self-serving interest.

The Court: The objection to the former question is sustained.

Q. (By Mr. Graham): Will you state, Mr. Northcutt, what is the fact as to whether or not all of the wage payments—and in particular overtime payments—to all non-manual employees were those specified in the Appendix E to the prime contract, being Exhibit Number 13, and the modifications thereof not here material as embodied in Exhibits 53, 54, and 66.

Mr. Flood: Mr. Reporter, will you read the question?

(Last question repeated by the reporter.)

Mr. Flood: I do not object if everyone and the witness understands by the question that it does not refer to a specific payment, since I do not understand the contract to call for the payment of

(Testimony of Ray H. Northcutt.)

any specific amount or amounts. The Master contract, as [164] I understand it, only calls for payments pursuant to certain schedules. If that is what the question contemplates and the witness understands, I do not object.

Mr. Graham: I believe we are together on what is intended by the question, Counsel. Without reading to the witness the schedule provided in the prime contracts—

Mr. Flood: I don't think he is more familiar with that than I am, so I don't question that part of it.

We have no objection.

The Court: The question may be answered if the witness can answer it.

A. I can answer what we did and why we did it. I am not sure that I can answer the question without infringing upon some prohibition here.

Mr. Flood: I think what he did is the most material thing we are interested in here.

Mr. Graham: Will you limit your answer to what you did. If you need to explain your answer, Mr. Northcutt, you may do so in so far as the same may be not prohibited by the court.

A. (Continuing): We made all payments for labor, wages, including all overtime payments to all employees—specifically non-manual employees—in strict accordance [165] with the War Department regulations 2236, 2390—

Mr. Flood: Just a moment. I object to the answer as not responsive. The question was limited to—

(Testimony of Ray H. Northcutt.)

Q. (By Mr. Graham): Limited to the prime contract Appendix E, Mr. Northcutt, and the supplements thereto which did not modify for any purposes here material the overtime payment provisions.

A. All right. In strict accordance with the provisions of a prime contract, the appendices and the exhibits 53, 54, and 66.

Q. Mr. Northcutt, can you state from your knowledge what is the fact with reference to whether or not the salary payments to all non-manual employees in Alaska were in accordance with the provisions of Circular Letter Number 2236?

A. They were.

Q. Can you state, Mr. Northcutt, what was the fact with reference to whether or not wage payments to all non-manual employees, employed in the Seattle office of the company, were made in accordance with the provisions contained in Circular Letter Number 2390?

A. Yes, they were.

Q. Can you state, Mr. Northcutt, what is the fact as to [166] whether or not all of the retroactive pay adjustments which you made following receipt of the so-called Abersold rulings, being the rulings of the Wage Administration Agency of the War Department, Exhibit 16 herein, for all non-manual employees, were made in accordance with the overtime pay policies and provisions as set forth in the Abersold rulings?

A. Yes, sir, they were.

Q. Following the receipt of the so-called Aber-

(Testimony of Ray H. Northcutt.)

sold rulings, and the effectuation thereof to which you previously testified, can you state, Mr. Northcutt, what is the fact as to whether or not thereafter all salary payments to non-manuals were in accordance with the pay provisions—and in particular the overtime provisions—contained in the Abersold rulings? A. They were.

Q. Mr. Northcutt, what was your understanding as to the applicability of the Fair Labor Standards Act to the activities of the company or to the activity of the employees of the company engaged in contract 7100 and contract 202?

Mr. Paul: I object to it on the ground that it is irrelevant. It has no probative value. The issue here is whether or not he relied upon a government ruling. And if Counsel's question may thus be construed, [167] perhaps it is proper. But now he is asking for a conclusion of this man's state of mind which is self-serving, a conclusion, and, as Mr. Flood has said many times, wishful thinking retrospectively, and this has no probative value at all.

The Court: Have you any response? What do you seek to prove by this question and the answer to it?

Mr. Graham: The good faith of the defendant, your Honor, involves his right to rely upon the ruling and instruction which he did receive. Counsel has attempted to indicate in briefs and other matters here submitted that the company knew or should have known that they were subject to the Fair Labor Standards Act. I believe the under-

(Testimony of Ray H. Northcutt.)

standing of this witness is material to the issue of good faith.

The Court: Contract 7100, is that the one that is referred to by the name of Excursion Inlet?

(Last question repeated by the reporter as follows: "Question: Mr. Northcutt, what was your understanding as to the applicability of the Fair Labor Standards Act to the activities of the company or to the activity of the employees of the company engaged in Contract 7100 and Contract 202?") [168]

Mr. Paul: I have a further objection.

The Court: You may state it.

Mr. Paul: That pure ignorance, without some affirmative action, has no value in proving anything. I assume his answer is going to be he thought it didn't apply. But the thought must have some real foundation to it other than an abstract idea that he caught out of the air. That is my objection. It has no probative value.

The Court: Overruled. He may answer this question.

Mr. Flood: Let me add for the record that it calls upon this witness to draw a conclusion with respect to the very issue in this case which the court has to pass upon. If a jury was here, it would be calling upon this witness to draw a conclusion upon a matter which would be an invasion of the province of the jury. That does not change the rule because the function now evolves upon the court.

(Testimony of Ray H. Northcutt.)

Furthermore, the Act does not exempt this company from liability if it pleads and proves that it had an erroneous understanding. So on that further ground it is incompetent, irrelevant and immaterial.

Mr. Graham: We are not testing here the coverage of the Act. We are testing the issues under [169] the Portal Act.

Mr. Flood: I say the Portal Act does not exempt an understanding no matter what the understanding may be.

Mr. Graham: I presume that the concession is that we acted in good faith.

Mr. Flood: I don't construe the understanding to be synonymous with good faith. Congress didn't use the word "understanding."

The Court: The question may be answered. The objection has been overruled.

Do you understand the question?

The Witness: I believe so, sir.

A. It was our understanding that the Fair Labor Standards Act did not apply to the activities of the company or its employees in the performance of Contracts 7100 and 202.

The Court: Is there any difference between the employees in that answer?

The Witness: No, sir.

The Court: That relates to all employees?

The Witness: All employees.

The Court: In Alaska?

The Witness: Yes, sir, and Seattle.

(Testimony of Ray H. Northcutt.)

The Court: None of them were affected by the [170] Act, is that your understanding?

The Witness: Yes, sir.

Q. (By Mr. Graham): Mr. Northcutt, in so far as the hiring of non-manual employees was concerned, what statements were the recruiters authorized to make to the prospective employees as to the overtime payments which they would receive?

Mr. Flood: Objected to as being incompetent, irrelevant and immaterial and not within the issues. There is no suit here about recruiters in the first place. Secondly, it is not the best evidence of authority and it assumes that there was authority and that there were statements made by recruiters. There is nothing in either the issues or the evidence in relation thereto. It is entirely extraneous.

The Court: Does this involve, according to your contention, Mr. Graham, a situation or principle similar to that which was before brought up about the Laporte, Indiana office?

Mr. Graham: No, your Honor. I offered this question for an entirely different reason.

In respect to the issues of alleged unconstitutionality of this statute, reliance is placed by counsel upon authorities, the intent of which is alleged to be [171] that the persons involved have been deprived of vested property rights in which, according to the decisions, they had expectations of realization. I simply intend to establish by this line of questions that that was not the fact in so far as any payments over and above those specified and prescribed in the employment agreements.

(Testimony of Ray H. Northcutt.)

Mr. Flood: Then, your Honor, it becomes clearly incompent, irrelevant, and immaterial and calls upon this witness to pass upon something with reference to what is and is not,—it calls upon this witness to testify with regard to what recruiters said, might or might not make vested rights. That is purely a question of law from the contracts in evidence and nothing that this witness could say, nothing that his agents could have said or nothing that the recruiters could have said could make or unmake vested property rights.

The Court: Nothing the recruiters could have said respecting their own status respecting overtime, is that what you point out?

Mr. Flood: Nothing that the recruiters could have said to the plaintiffs in this case could have affected their property rights. Their property rights crystallized and either were or were not property rights in accordance with the contract when it was entered [172] into, and everything that the recruiters said merged with the contract.

Mr. Graham: With that statement of counsel, I withdraw the question.

The Court: Proceed.

Mr. Graham: Mr. DeGarmo has, I believe, a few questions.

Mr. DeGarmo: I have no questions, if your Honor please. I wish to ask your Honor this: I am a little disturbed about the state of the record on the offer of proof which was made.

Your Honor sustained the objection as I heard you upon the ground of the form of the question.

(Testimony of Ray H. Northcutt.)

I had that in mind and I did not have in mind any objection specifically dealing with that point. I would like to have the record read to me so that I will know what the objection was to the form of the question so that I may determine whether I should reframe the question or not.

The Court: Read the record beginning with that part of it which related to the offer as made by Mr. Graham, and continue reading until you have finished with Mr. DeGarmo's offer and the court's statement thereon. [173]

(Offer of Proof of Mr. Graham and also of Mr. DeGarmo as well as testimony in between the same repeated by the reporter.)

Mr. DeGarmo: That is sufficient. I wanted to be sure as to the form of the questions,—whether it propounded a question and answer.

The Court: I can only repeat that the form of the court's ruling as to the form of the question was without prejudice to the defendants inquiring as to what actions were taken and what things were done, in view of and pursuant to these directives—the Abersold directives I think you are talking about specifically, are you not—any and all of the things that were done in the way of rulings, discussions, consultations and communications by the persons purporting to act for the War Department and other governmental agencies.

Mr. DeGarmo: The basic difference between your Honor's view apparently of the situation and ours is that what was done proves conformity. That I think we have already done. And upon the other

(Testimony of Ray H. Northcutt.)

I am satisfied that the offer of proof is in proper form.

The Court: You may proceed.

Mr. Graham: I would like to ask a specific [174] question your Honor.

The Court: You may do so.

Q. (By Mr. Graham): You have testified, Mr. Northcutt, in questions just recently propounded to you, that it is a fact that the salary payments,—and particularly the overtime payments to the non-manual employees in Alaska—were in accordance with the provisions relating to salary payments and in particular overtime payments as contained in Circular Letter Number 2236. Now I should like to—

Mr. Flood: I don't want to interrupt, but I object to the form of the question as already disclosed. This is direct examination and there is no occasion to repeat the testimony to the witness and to hypothecate it to the witness because it amounts to nothing more than being leading and suggestive. I object, your Honor, on the ground that on the direct examination the only proper form of the question is to propound a question and not to summarize the testimony.

Mr. Graham: I would like to ask permission of the Court to complete my question before Counsel objects.

The Court: You may complete it and I will hear you then. [175]

(Testimony of Ray H. Northcutt.)

(Last question repeated by the reporter as follows: “Question: You have testified, Mr. Northcutt, in questions just recently propounded to you, that it is a fact that the salary payments,—and particularly the overtime payments to the non-manual employees in Alaska—were in accordance with the provisions relating to salary payments and in particular overtime payments as contained in Circular Letter Number 2236. Now I should like to—”)

Q. (By Mr. Graham, continuing): —ask you whether or not the non-manual salary overtime payments for the Alaska employees were established in accordance with the provisions of Circular Letter 2236 in reliance upon and by reason of Circular Letter Number 2236.

Mr. Flood: I object to that, your Honor. I renew my former objection and object to it further on the grounds it is incompetent, irrelevant and immaterial; thirdly, that it is a complex question predicated upon,—the answer to this would apply to two or three different premises, none of which are particularized; and moreover on the general ground that calls for this [176] witness by a conclusion of his own to pass judgment upon an issue that is reserved for the court as a matter of law.

The Court: The objection is sustained with leave, however, to ask the witness what if anything he did pursuant to that circular with respect to overtime payments and salary payments of the non-manual employees.

(Testimony of Ray H. Northcutt.)

Mr. Flood: I have no objection to that.

Mr. Graham: I believe, your Honor, the record already does disclose that which the court has just ruled may be inquired. I do desire to make the offer of proof, your Honor, by the witness on the stand.

The Court: You may do that.

Mr. Graham: That is asked the question he would answer that the conformity to which he testified in his previous questions resulted from reliance upon and because of Circular Letter Number 2236. And to shorten again the record I should like to ask again that same question with reference to the non-manual employees employed in Seattle, as relates to Circular Letter Number 2390, and to make the same offer of proof; and likewise the same question and offer of proof in so far as the provisions of the Abersold rulings are concerned.

Mr. Flood: The same objection to the offer [177] of proof as the grounds which were stated in objection to the former question.

The Court: The objection is sustained.

Mr. Graham: I believe that is all I have, your Honor. I believe that the ultimate fact of reliance is a fact which is the proper subject of testimony of the witness and I think the offer of proof on the two various questions which I have propounded—

The Court: The Court will consider all of the offers of proof offered and determine whether the defendant in question or any of the defendants did rely upon these rulings in what they did.

(Testimony of Ray H. Northcutt.)

Mr. Graham: I have no further questions of Mr. Northcutt, your Honor.

Cross Examination

By Mr. Paul:

Q. Turning to Exhibit 14, Mr. Northcutt, the Circular Letter 2236, and drawing your attention to Paragraph 1, which recites:

“The following requirements as to the hours of work, overtime allowances, and provisions for leave accrual for all non-manual employees of [178] cost-plus-a-fixed-fee principal and sub-contractors in connection with construction projects will be included in all future negotiations for such contracts.”

Was your acceptance of 2236 a part of the requirements of the United States in your getting your prime contract?

A. I don't know that it was a,—it wasn't a consideration. We understand simply that the provisions would be incorporated in the prime contract and would govern our employment policies, under the contract.

Q. If you had wished to deviate for any reason from 2236 would it have been a breach of your prime contract?

A. In so far as the provisions of 2236 were incorporated in our prime contract, yes.

Q. If you had wished to deviate from 2236 in relation to overtime of non-manuals, would that have been a deviation from the prime contract?

(Testimony of Ray H. Northcutt.)

A. Yes.

Q. And the same is true of 2390?

A. Yes, sir.

Q. Turning your attention to Exhibit 21, and in particular to paragraphs 1. b and 1. c, it is apparent from such paragraphs that the laws therein enumerated, including the Fair Labor Standards Act, are administered by [179] agencies other than the War Department?

A. Not to me in this instance.

Q. Drawing your attention to the last sentence in paragraph 1. b, "However, some contractors have submitted such problems direct to civilian agencies without clearance through the War Department."

Are you advising the court that the War Department by means of Exhibit 21 is not informing you that civilian agencies primarily administered the executive orders established and enumerated in paragraph 1. c?

Mr. Graham: If your Honor please, I don't understand quite what the question means. Maybe the witness does.

The Court: Does the witness understand the question?

The Witness: I think I do.

The Court: You may answer it.

A. From Exhibit 21, paragraph 1. b states that some contractors have submitted such problems directly to civilian agencies. But in Exhibit 21, in paragraph 1. c it says,

(Testimony of Ray H. Northcutt.)

“Since the War Department is responsible for all of these things,” and so forth and so on—“all such problems will be submitted through the Contracting of Commanding Officer.” [180]

In so far as our contract was concerned, it was our interpretation then and now that this Exhibit 21 made it mandatory upon us to submit to the War Department for all rulings and procedure,—“all such problems will be submitted through the Commanding Officer” and that is what we did.

Q. (By Mr. Paul): Mr. Northcutt, it is a fact, is it not, that you knew that the Fair Labor Standards Act was administered by the Wage and Hour Division? A. Yes, sir.

Q. And you knew it in 1943? A. Yes, sir.

Q. And. 1944? A. Yes, sir.

Q. That the Wage and Hour Division generally had jurisdiction of problems arising under the Fair Labor Standards Act? A. Yes, sir.

Q. Did the Seattle office employees file a complaint with the Wage and Hour office in December, 1933, regarding their confirmation of the rates from a 44-hour week to a 40-hour week?

Mr. Graham: May I hear the question?

(Last question repeated by the reporter.)

Mr. Graham: There is no showing a complaint was filed. There is no showing that the witness has any knowledge thereof and the question is not within the witness' knowledge.

The Court: If the witness doesn't know the

(Testimony of Ray H. Northcutt.)

answer, I assume his response would be in keeping with his state of mind. You may answer if you know the answer.

A. We had a communication from the Wage and Hour Division about the same time or shortly following that received from the War Labor Board in connection with the salary confirmation,—the application of the War Department salary confirmation formula.

Q. (By Mr. Paul): Is that an exhibit which was under the signature of Walter Neubert?

A. I believe so.

Q. Was there an earlier one than that?

A. The original inquiry in that connection was about May, 1944, I believe.

Q. Notifying an inspector? A. Yes.

Q. Before we get to those later episodes I want to know if you know of your own personal knowledge that a complaint was filed by some of your Seattle office [182] employees in the Wage and Hours Division in December, 1943?

A. No. I think our first intimation of that was in May, 1944, if I remember correctly.

Q. Is it not true that during January and February, 1944, there was considerable dissension in your Seattle office regarding the conversion of the 44-hour to the 40-hour week?

A. Yes; on the grounds that it was a violation of 9250 and that it constituted—

Mr. Paul: Just answer the question. I move that the last be stricken on the ground it is not responsive.

(Testimony of Ray H. Northcutt.)

The Court: That he may not explain the grounds? Read the question.

(Last question repeated by the reporter.)

The witness may answer the question. If he feels he must explain it to make his answer speak the whole truth, he may do so.

The Witness: I think the previous answer is correct in every respect.

The Court: It will stand.

Q. (By Mr. Paul): Is it not true that the dissension [183] spread throughout the Seattle office during January and February, 1944?

A. No, that is not correct. It was limited to a very few at that time.

Q. Is it not true that during those two months that you held meetings with the employees relating to this conversion problem?

A. We held one meeting that I recall at which I addressed the employees and explained the instructions of the War Department with respect to the salary conversion from the basic 44-hour week to the basic 40-hour week. That would have been I believe, in about December of '43.

Q. That was in December, 1943?

A. I believe so; in December, '43.

Q. Who attended the meetings?

A. All of the employees in the Seattle office.

Q. Was Mr. Atkinson at that meeting?

A. No, sir; not to my recollection.

Q. Is that the only meeting you had relating to that subject with the employees?

(Testimony of Ray H. Northcutt.)

A. That is the only meeting with the employees other than discussions with the interested department heads, such as the Personnel Manager and Office Manager.

Q. Getting back now to—I believe it is Exhibit—may [184] I see the exhibits? I believe it is Exhibit Number 25.

The Court: What exhibit are you referring to now, Mr. Paul?

Mr. Paul: I was trying to find it.

Q. (By Mr. Paul): When was the first time that you were notified that it was necessary for you to get War Labor Board approval of wage adjustments?

A. It was after our submission of the salary schedules and requests for adjustments.

Q. That was approximately the 25th day of October, 1943?

A. We submitted it October 20th, 1943. And the return was about a month later, I believe—some time in November. And in one of those returnings we were instructed to go to the War Labor Board, and in another to the Treasury Department.

Q. That was during the end of October, 1943?

A. No. That was in November, 1943. We made our submissions in October.

Q. When did the Army auditors at the jobsite begin refusing to certify your payrolls for an alleged failure to comply with Executive Order 9250?

A. I don't know.

Q. I will refer you to Exhibit 30, dated January

(Testimony of Ray H. Northcutt.)

28th, [185] 1944 and in particular to Paragraph 3 on page 2 wherein it is stated,

“Your Project Auditors, while not contesting the necessity, justification or equity of the establishment of the approved uniform schedules, do contend that their application may be considered as being in contravention of the Wage Stabilization Act in instances wherein the individual rates paid are higher or lower than previously paid.”

A. They were not disapproving payrolls. They were merely indicating that they would unless the established schedules were adjusted through application to some authoritative body. We did not place the adjustment into effect until after they were approved, as you will notice from this,—if this is what you are citing.

The Court: At this time we will be adjourned until tomorrow morning at 10:00 o'clock.

(At 4:40 p.m., Tuesday, December 9, 1947, proceedings adjourned until 10:00 a.m., December 10, 1947, in the United States Court House.)

Seattle, Washington

December 10, 1947, 10:00 o'clock a.m.

(All parties present as before.)

The Court: In the case on trial you may now proceed.

RAY H. NORTHCUTT—(Resumed)

Cross Examination—(Continuing)

By Mr. Paul:

Q. Mr. Northcutt, prior to November 1, 1943, did you say you had a work week of 44 hours for Class A employees?

A. Prior to November 1, 1943, we had a work week for all employees of 44 hours in the Seattle headquarters office.

Q. When employees worked for more than 44 hours—Class A employees—what rate would those Class A employees be paid for hours in excess of 44 hours?

A. Class A employees would be paid time and one-half for overtime in excess of 44 hours including the sixth day, and I believe double time for the seventh day.

Q. Class B employees? [187]

A. I am not sure of the double time on the Class A in Seattle. But they would be paid overtime at the rate of either time and a half or double time.

Class B employees would receive no overtime for any work except the seventh day and that would have to be authorized prior to working or pay.

The Court: Prior to working or being paid?

The Witness: That is it; prior to working or being paid for it.

Q. (By Mr. Paul): I believe you also testified, did you not, that you conformed to Circular Letter 2236 prior to November 1, 1943?

A. 2236 covered off-shore—

(Testimony of Ray H. Northcutt.)

Q. Was my question a true statement,—if you have previously testified that you conformed to Circular Letter 2236? A. Prior to when?

Q. November 1, 1943.

A. Yes,—for some time prior to November 1, 1943 and throughout the period of contract 202.

Q. Now, calling your attention to Exhibit 14 and to page 2 thereof, the bottom paragraph denominated d. A. Yes.

Q. Reading as follows:

“Group A employees will be paid at the rate of [188] straight time for all work which they are required to perform in excess of 48 hours during the first six days of any regularly scheduled work week, and at the rate of two times straight time for work which they are required to perform on the seventh consecutive day of such work week.”

Did you conform prior to November 1, 1943 with that paragraph of Exhibit 14 being Circular Letter 2236?

A. 2236 applied to employees in Alaska rather than the Seattle office, as I recall.

The Court: Will you try to determine that now because that is something I would like to note in this connection.

The Witness: Might I inquire if Circular Letter 2390 is in this group of exhibits?

The Court: Will Counsel who may be familiar with the present location of those exhibits—

(Testimony of Ray H. Northcutt.)

Mr. Paul: I would like to interpose an objection to your Honor's question. This witness,—this employer is here before the court pleading the fact that he relied upon a regulation, interpretation order, in payment of his wages. Now, if he does not know what regulation he relied upon, that is an element that must be taken into account. For Counsel to supply [189] an answer,—it is this witness who is asking for relief of liability of several judgments.

The Court: In explanation of the witness' last answer, it is the court's desire at this time to have further information for the assistance of the court in this connection. Your objection is noted and is overruled.

I request that the witness be supplied with both of these because I wish the witness to finally and definitely say whether or not 2236 concerns only Alaskan employees.

Mr. Flood: If your Honor please, for the clients whom we represent, I object to the witness characterizing what the exhibit refers to. It speaks for itself and it is for the court to interpret the extent of its coverage.

The Court: I believe the Court will sustain that objection. You may proceed and disregard the court's request.

Q. (By Mr. Paul): The question, Mr. Northcutt, is did you conform to Circular Letter 2236 for your Seattle office employees prior to November 1, 1943 and in particular the paragraph d at the bottom of page 2 of Exhibit 14 being Circular Letter 2236.

(Testimony of Ray H. Northcutt.)

A. It is my recollection that 2236 and the provisions—

Q. I asked the question: Did you or did you not.

A. I am trying to answer your question as best I can. I say it is my recollection that these provisions of 2236 that you cited applied to our employees in Alaska and that the Circular Letter 2390 applied to the employees in the Seattle office.

Mr. Flood: Mr. Reporter, would you read the question?

(Question before the last read aloud by the reporter.)

Mr. Flood: The answer is unresponsive, your Honor.

The Court: It is not a direct answer. He is entitled to a direct answer. The objection is sustained and the motion granted. Just answer the question directly.

A. I cannot answer that question without reference to the files to refresh my memory.

The Court: If Counsel wishes an answer, the witness will have to have that privilege, I guess. Counsel has the election of accommodating the witness in the respect mentioned or abandoning the question, [191] whichever he prefers to do.

Q. (By Mr. Paul): Will you refer to Exhibit 15, Mr. Northcutt, Circular Letter 2390?

A. Yes, sir.

Q. Did you conform to 2390 for your Seattle office employees prior to November 1, 1943?

Mr. DeGarmo: If your Honor please, I would

(Testimony of Ray H. Northcutt.)

like the privilege of also directing the witness' attention to Exhibit 24 in this same connection for his refreshment of recollection that I think should also be called to his attention.

The Court: It depends upon whether the witness needs his recollection refreshed, I believe, gentlemen.

Mr. Flood: He has not so far indicated that he does.

May I have the last question read?

(Last question repeated by the reporter.)

The Court: I didn't recall an answer in dealing with this question that the witness had requested assistance or refreshment of his memory.

Mr. DeGarmo: I thought I heard the witness say he could not answer the question unless he had the opportunity to refer to the exhibits on file. [192]

The Court: He made some statement that I would interpret to that effect in connection with some other question but I hadn't recalled that he did it in connection with this one.

Mr. DeGarmo: Maybe he changed the question. I didn't understand there was a change in the question.

The Court: Now it is a question of what the witness' present ability to answer is.

Proceed. If you can answer the question, do so.

A. I believe so, sir. Prior to November 1, 1943, the salary schedules and overtime provisions prescribed for our use were stipulated, basing salaries on a 44-hour week effective November 1, 1943. That was changed to a basic 44-hour week.

(Testimony of Ray H. Northcutt.)

Mr. Paul: I move the answer be stricken.

The Court: The latter part of it seems to be a volunteer answer and is stricken. The first sentence in the answer is, I believe, responsive.

Mr. Paul: The question is did he conform to Circular Letter 2390 in the payment of wages prior to November 1, 1943.

The Court: There is a part of it which is responsive, in my opinion. It is the first part I would say.

(Last question and answer repeated by the [193] reporter as follows:

“Question: Did you conform to 2390 for your Seattle office employees prior to November 1, 1943?

“Answer: I believe so, sir.”

The Court: Add a period there, Mr. Reporter, and strike the rest of it.

Q. (By Mr. Paul): Did you conform to Circular Letter 2390 prior to November 1, 1943?

A. I cannot say for certain the extent to which the regulations in 2390 were effective prior to November 1, 1943 without recourse to our records.

Q. Turning your attention to page 6 of Exhibit 15, being Circular Letter 2390, and to paragraph 9. f (1), and paragraph 9. f (2), which reads as follows:

“(1) Group A employees will be paid at the rate of time and one-half for all work which they are required to perform in excess of 40 hours during the first six days of any regularly

(Testimony of Ray H. Northcutt.)

scheduled work week, and at the rate of two times straight time for work which they are required to perform on the seventh consecutive day of such work week. [194]

“(2) Group B employees will be paid at the rate of straight time for all work which they are required to perform in excess of 40 hours per week.”

My question is, did you conform to those two paragraphs of Circular Letter 2390 being Exhibit 15 for identification prior to November 1, 1943?

A. I cannot say without an opportunity to refresh my memory to a certainty and I would rather not attempt to—

Q. Well, didn't counsel yesterday ask you whether or not you conformed to 2390?

A. He did.

Q. And wasn't your response then—

A. My response was that we did comply with 2236 and 2390. As to the effective dates when they were placed into effect, I cannot recall without some reference to a record. I can say that we placed them into effect at the time specified by the War Department,—of that I am sure. As to when that date was, I wouldn't want to attempt to say.

Q. Calling your attention to Exhibit 75 are you familiar with that exhibit?

A. Yes, sir, I recall it. [195]

Q. Would you have paid wages exactly as you did pay them if you had received this letter, Exhibit 75, on August 28th, 1942?

(Testimony of Ray H. Northcutt.)

Mr. Graham: If your Honor please, I would like to object to the question. It presupposes a hypothetical question as to what this witness would have done at this time compared to what he would have done three or four years ago based upon the fact if something else had happened.

The Court: Overruled.

Mr. Graham: I also call the court's attention to the fact that Exhibit 75 as yet has not been offered. I object to questions relating to the same unless it be offered.

The Court: Overruled. There are a lot of advantages in trying the case as to all parties in this way. In the Pre-trial Order I am sure that the parties agreed to all of the facts they could at that stage. One disadvantage is offset by many other advantages which have been accomplished already.

Mr. Graham: May I ask the reporter to read the question.

(Last question repeated by the reporter.)

Q. (By Mr. DeGarmo): If your Honor please, I know you have already ruled on this but I can't see what possible probative fact that would establish. Assuming that the witness would now say yes or no he is asking him to state what his state of mind would have been two years before the date on its face. It is dated in 1944. Obviously it couldn't have been received or sent in 1942.

The Court: The ruling will stand. You may answer the question if you can.

A. We would have followed the instructions

(Testimony of Ray H. Northcutt.)

contained in the Exhibit 75 which constitutes an interpretation and directive in 1942, the same as we did in 1944, I would say.

Q. (By Mr. Paul): I don't understand your answer.

A. We had no alternative but to follow the orders and instructions of the War Department, and they were the agency advising us and we certainly presumed that they were competent to instruct us in these matters and we would have followed this the same in 1942 as we did in 1944, if we had had it in 1942, I would say.

Mr. DeGarmo: I would like to ask counsel if he is attempting by his question to presuppose Circular Letter 2390 was issued in 1942 he is in error. Obviously, [197] the document here relates substantially entirely to the provisions of Circular Letter 2390 which according to the evidence here was issued and promulgated in May, 1943.

The Court: Mr. Paul, are you so presupposing?

Mr. Paul: No, I am not, your Honor.

Mr. Flood: I submit, your Honor, the witness understood the question and answered.

The Court: The answer will stand. Counsel for the defendant may redirect some further questions on this point if he feels there is something which is not sufficiently clarified.

Q. (By Mr. Paul): The question, Mr. Northcutt, would you have followed Circular Letter 2236 and Circular Letter 2390 if you had received this letter on August 28th, 1942?

(Testimony of Ray H. Northcutt.)

Mr. Graham: If your Honor please, I will offer the same objection. It is asking this witness to testify as to what he would have done at a period two years earlier than the date of this letter recites. It is asking at this time what he would have done at a period five years heretofore.

The Court: The objection is overruled. It relates to this man's attitude at the time in question. [198] It has some testing power as to that, in my opinion. The objection is overruled.

Mr. DeGarmo: May I have the question again, please?

(Last question repeated by the reporter.)

A. That is a difficult question to answer simply yes or no without some explanation to accompany the answer. I would answer it in this way: that this directive, as any other directive from the War Department, interpretation or instruction, being an official directive and an interpretation—

Mr. Flood: I move that the witness' characterization of what it is go out, your Honor, and the document be allowed to speak for itself as to what it is.

The Court: The objection is overruled; motion denied.

A. (Continuing): We would have placed it in effect as we did with any such directives which appeared to be proper.

Q. (By Mr. Paul): I notice in Exhibit 75 that there is a phrase on paragraph 2 of page 1 reading as follows:

(Testimony of Ray H. Northcutt.)

“In your letter were several fundamental questions which we believe have been informally [199] answered prior to this time but are now being formally answered for your records.”

Over a period of how many months prior to the receipt of this letter had you been discussing with the Army officials the contents of this letter?

Mr. Graham: If your Honor please, I would like to ask counsel what he refers to by the “contents of the letter.”

The Court: Will Mr. Paul answer that question?

Mr. Graham: If he means the written material set forth here obviously the question is unintelligible for the reason that the letter did not appear. If he refers to the subject matter as captioned in the first paragraph of the letter, I have no objection.

Mr. Flood: If the Court please, the questions asked and the answers called for are in respect to Exhibit 75. On the assumption I am fairly correct on that, I am going to ask that the exhibit—I think the record shows Exhibit 75 has not thus far been offered—I am going to ask that it be identified by this witness, if he can identify it, and that it be offered at this time.

Mr. Graham: No objection.

Mr. Flood: If no one else offers it, I will. [200]

Q. (By Mr. Paul): What is the letter, Exhibit 75, dated April 13th, 1944?

(Testimony of Ray H. Northcutt.)

A. A letter from the War Department signed by Major Tait, Contracting Officer, directed to the Guy F. Atkinson Company. It is in response to our letter of December 23rd, 1943, on the subject of salary conversion, Seattle employee, 44-hour basic week to 40-hour basic week.

The Court: Mr. Flood, do you ask that it be admitted now?

Mr. Flood: I now move it be admitted.

Mr. Graham: No objection.

The Court: It may be marked.

(Letter marked Defendants' Exhibit 75 for identification.)

The Court: Defendants' Exhibit 75 is now admitted.

(Defendants' Exhibit 75 received in evidence.)

Q. (By Mr. Paul): How many months earlier than April 15th, 1944, had you discussed the contents of this letter with the Army officials?

Mr. Graham: If your Honor please, my objection was originally directed and still stands. I am not [201] clear in my mind as to whether counsel's letter refers to the contents which appear to be written and obviously were in being at any time prior to April 15th or whether counsel refers to the subject matter referred to in the first paragraph. If the latter is the interpretation of counsel's question, I have no objection.

The Court: Will you answer, Mr. Paul, as to which you refer to?

(Testimony of Ray H. Northcutt.)

Mr. Paul: I will rephrase my question, your Honor, if I may.

Q. (By Mr. Paul): How many months prior to April 13th, 1944, had you discussed the Seattle conversion problem with the Army officials?

A. We discussed some features of the salary conversion formula very shortly after the first advice to place it into effect, namely, about early November, 1943.

Q. How much earlier than the 15th of April, 1944 had you discussed the origin of Circular Letter Number 2390?

A. I don't recall that the origin of 2390 was discussed in connection with this. It may have been.

Mr. Graham: If your Honor please, I suggest that Circular Letter Number 2390 on its face sets forth its origin as a circular letter of the War Department [202] through the office of the Chief of Engineers.

A. (Continuing): Your question was when did we discuss the origin of 2390?

Q. (By Mr. Paul): Yes. How much earlier?

A. I would say about the time of its receipt.

The Court: Do you know when its receipt was or approximately when it was?

The Witness: I don't recall offhand; no, sir.

Mr. Graham: I believe the record so shows, your Honor, in the list of exhibits.

The Court: Is the showing before the court as evidence at this time?

(Testimony of Ray H. Northcutt.)

Q. (By Mr. Paul): Did you receive the circular at approximately the time it was issued?

A. At the time it was issued by the War Department?

Q. Yes—May 13th, 1943.

A. That I do not recall. We were provided with additional copies of it at different times and when we received the first I would hesitate to say. I think that can be determined but that is too much for me to attempt to quote from memory.

Q. Drawing your attention to the phrase in paragraph 2 of Exhibit 75 reading as follows, [203]

“The Wage and Hour people believe that it did apply.”

A. What page is that?

Q. Page 2 of Exhibit 75.

A. Page 2, paragraph 2?

Q. Yes; the second sentence—the first half of the second sentence.

A. Yes, sir.

Q. Did you make any inquiry directly to the Wage-Hour office itself as to their attitude of the coverage of the Act on your employees upon receiving this letter?

A. No, sir. We discussed it with the Army Engineers, the War Department, but not the Wage-Hour people.

Q. Had you received this letter containing that phrase, “The Wage and Hour people claimed that it did apply,”—had you received that on August 28th, 1942, would you have paid the wages exactly as you actually did?

(Testimony of Ray H. Northcutt.)

Mr. Graham: If your Honor please, I should like to object to the question and also direct counsel's attention to and request the Court to require as a condition of the answer of this question a reference to Exhibit Number 21.

The Court: The Court denies the request. You may proceed.

Mr. Paul: I didn't hear the ruling, your Honor.

The Court: You may proceed to have the question answered in its present terms without any amendment or change of terms.

The Witness: May I have the question again, please.

(Last question repeated by the reporter.)

Mr. Graham: If your Honor please, I object to the question. I should like to state my grounds for the objection.

The Court: You may make your statement for the record.

Mr. Graham: It is asking this witness to presuppose a hypothetical set of circumstances as to what his condition of mind would have been several years prior to receipt of the document and particularly calling his attention to the fact that intervening in such period were numerous documents and instructions, a portion of which are embodied in documents here exhibited numbers 20 and 21 being instructions from the War Department as to the procedures to be followed by the contractor.

The Court: The objection is overruled. Is the question answered?

(Testimony of Ray H. Northcutt.)

The Witness: No, it is not. I find it difficult [205] to—

The Court: If you are able to answer the question you are now asked to do so.

A. Well, I am placed in the position of transplanting some of the circumstances of April, 1944 to what time—August, 1942?

Mr. Flood: Your Honor, I don't think we should have the witness thinking out loud. He should answer the question if he can. Of course, if he cannot he can say so.

The Court: The objection is sustained. The witness is directed to answer the question if he can do so.

Mr. Flood: He is an expert witness and he certainly is accorded the right to use any mental processes he wishes to arrive at the conclusion.

The Court: That is sufficient comment. You may proceed.

A. I would make the same answer as I did before, that assuming the same conditions in 1942 as we had in 1944, we would certainly have followed the instructions of the War Department in the absence of any other instructions.

The Court: The court would like to know why you feel you would have done so. [206]

The Witness: Why, sir, the War Department represented themselves to us as the authoritative body to instruct us and direct us in all matters pertaining to labor, payments of wages, overtime and so forth. And we were given to understand by

(Testimony of Ray H. Northcutt.)

the War Department that they had taken and would continue to take all necessary steps with the Department of Labor and that all instructions and interpretations to us would emanate from the War Department, and until we heard to the contrary from the Department of Labor we would naturally and did in 1943, '44 and '45 follow the War Department on that basis and we would certainly have done so on the same basis in 1942.

The Court: You may inquire further.

Q. (By Mr. Paul): Did a Wage and House inspector call on you in 1944?

A. Yes; subsequent to this time.

Q. What date was that?

A. Early in May, 1944.

Q. About the first of May, 1944?

A. Yes; the first week in May, I believe.

Q. Did he make an inspection of your books?

A. Yes. He called at my office and wished to see the form of contract and the manner in which purchases were [207] made, when title passed to materials purchased for performance of our contract, payrolls, and all other documents that he cared to examine.

Q. Calling your attention to Exhibit 72, I will ask you to identify that.

The Court: Are you going to another subject?

Mr. Paul: Yes; in a sense it is.

The Court: Before doing that, I would like to ask the witness if respecting gain or loss it made any difference to your company whether it paid

(Testimony of Ray H. Northcutt.)

the non-manual employees more or less so long as your payment to them was approved by the War Department?

The Witness: No, sir; it made no difference in gain or loss to us.

The Court: Is it or is it not a fact that you would have obtained reimbursement from the United States Government through the proper channels for any payments made to non-manual employees if the amounts now claimed had then been paid?

The Witness: Subject to audit and approval by the government's auditors as to conformance with all of the government's regulations, we presumably would have been reimbursed in full for all payments made accordingly.

The Court: On the basis of compensation to [208] your company, under the construction contract—the so-called cost-plus-a-fixed-fee arrangement—would the fee which your company would have received for its compensation under this contract been greater if the compensation to non-manual employees had been greater?

A. No, sir; neither greater nor less. It had no effect on the fee.

The Court: You may now inquire of the exhibit or anything else properly within range of the examination.

Q. (By Mr. Paul): Will you identify Exhibit 72?

A. Yes, sir. Exhibit 72 is a letter from Guy F.

(Testimony of Ray H. Northcutt.)

Atkinson Company to the Wage and Hour Division, United States Department of Labor, Seattle, Attention of Mr. Leonard Cecil, dated May 4, 1944, and furnishes information requested by Mr. Cecil on the 2nd of May.

Q. Was this letter written in response to the Wage and Hour inspector's request for general information concerning the operations of your company? A. Yes, sir.

Q. Did he at that time make an inspection of your non-manual wage structure, with particular emphasis on overtime? [209]

A. I believe subsequent to this.

Q. How subsequent? A. Oh—

Mr. Flood: If no other party does, I offer Exhibit 72 at this time, your Honor.

The Court: Is there any objection?

Whose exhibit is Number 72?

Mr. Graham: This is a plaintiff's exhibit, your Honor. I believe it is already offered by the terms of the Pre-Trial Order.

(Letter marked Plaintiffs' Exhibit 72 for identification.)

The Court: Is there any objection to its being admitted at this time?

Mr. Paul: No objection, your Honor.

The Court: It is admitted.

(Plaintiffs' Exhibit 72 received in evidence.)

Mr. DeGarmo: Only the objections which are

(Testimony of Ray H. Northcutt.)

contained in the Pre-Trial Order, if your Honor please.

The Court: Those objections are overruled and this exhibit is now admitted, Plaintiffs' Exhibit 72.

Q. (By Mr. Paul): How soon after the writing of this letter, Plaintiffs' Exhibit 72, was the inspection of [210] your overtime wage structure of non-manuals made by the Wage and Hours inspectors?

A. Within a matter of a few weeks after that, I believe.

Q. Did he express an opinion at that time as to your compliance with the Fair Labor Standards Act?

Mr. DeGarmo: If your Honor please, we wish to object to that question upon the ground that any expression of opinion by a Mr. Cecil, unless it was shown to be by someone authorized to express an opinion with authoritative results would be of no weight whatever as to the issue before the Court.

Mr. Paul: Your Honor, I would like to object to the over-stating of our case. In order to defeat the defense under Section 9, we don't have to substitute another ruling; we have to show that this man did not act as a reasonably prudent business man. Anything that puts him on notice—whether Mr. Cecil was authorized or unauthorized. If the facts are sufficient to put this man, as a reasonably prudent business man, on notice and giving him

(Testimony of Ray H. Northcutt.)

facts sufficient to impose upon him the obligation of making further inquiry, that is all we need to do in order to win this case.

The Court: At this stage the court does not accept as the law your present statement.

Mr. Paul: That is the interpretation given by [211] the Administrator and I believe will be supported by the facts. But I object—

The Court: The court will be glad to hear your authorities in support of that contention. At present the court does not accept it as the law but whether it is or not I think the inquiry objected to by Mr. DeGarmo is appropriate cross-examination. For that reason the objection is overruled.

Mr. Paul: I believe there is a question pending.

(Last question repeated by the reporter.)

A. Mr. Cecil, the examiner, stated that he was merely gathering data and that the resolving of the matter between the War Department and the Department of Labor would be—

Mr. Paul: Just a minute. I asked you a question and I expect you to answer the question.

I move that the answer be stricken so far.

The Court: I will have to hear the question and the answer.

(Last question and answer repeated by the reporter.)

The Court: The answer may be discontinued at [212] this point, but so far as it has gone, it will remain and the request to strike it is denied.

Mr. Paul: I will repeat my question, Mr. Northcutt.

(Testimony of Ray H. Northcutt.)

Q. (By Mr. Paul): Did the inspector during the early part of May, 1944, express an opinion as to whether or not your overtime wage structure for non-manuals was in compliance with the Fair Labor Standards Act?

A. I can answer that—what you have asked me is about half of his expression to me of opinion as to the situation of which you inquire. He stated that it was not his province to express opinions. He stated that the overtime as paid in certain instances was not in accordance with overtime prescribed by the Fair Labor Standards Act; that he did not know whether we were under the Fair Labor Standards Act or not and that the matter of the War Department's handling of the administration of such problems and questions with the Department of Labor was something that he would have to refer to his superiors for opinion.

Q. In my deposition, Mr. Northcutt, taken July 17th, 1947 in my office—

The Court: The deposition of yourself as a witness—is that what you refer to? [213]

Mr. Paul: The deposition of Mr. Northcutt, taken by me.

The Court: All right.

Q. (By Mr. Paul): Did I ask you a question as follows:

“Did he ever communicate to you what his observations were as to the legality of your wage structure?” and did you respond “He said that in accordance with his understanding

(Testimony of Ray H. Northcutt.)

and instructions that our overtime, payment of overtime, was not in accordance with the rules and regulations with which we operated”?

A. That is what I have just said.

Q. There is no doubt in your mind that the rules and regulations which he meant referred to the Fair Labor Standards Act?

A. That is correct.

The Court: By whom was he employer, if you know?

The Witness: The Seattle office of the Wage and Hour Division of the Department of Labor.

Q. (By Mr. Paul): And you knew it at that time?

A. Yes. He introduced himself when he came and explained his—

Q. Earlier, Mr. Northcutt, I believe you hired an attorney, [214] Mr. Frank Mechem, when you were having trouble with stabilization approval, is that true?

A. Yes, sir.

Q. Did you at this time consult an attorney as to your coverage of non-manual employees under the Fair Labor Standards Act?

A. The question of Fair Labor Standards—

Q. I asked you: Did you or did you not hire an attorney at that time?

Mr. DeGarmo: If your Honor please, he also included a statement as to the rest of the matter. I ask that the question be read.

(Last two questions repeated by the reporter.)

(Testimony of Ray H. Northcutt.)

Mr. DeGarmo: I would like to know which question he wants answered—did he hire an attorney or did he hire an attorney with regard to the Fair Labor Standards Act?

The Court: The objection is overruled.

A. We hired an attorney on instructions from the War Department—Mr. Mechem—to assist with the presentation and submission of the uniform contractors' non-manual salary schedule. The only matter under consideration there was the matter of establishing and getting approval for this uniform salary and its adjustments [215] in the salary structure of certain employees.

The Court: Can you make the matter more convenient to the court by saying when you talked to Mr. Cecil on the occasion you, a few minutes ago, have been testifying concerning?

The Witness: In May, 1944, sir.

The Court: You may proceed.

Q. (By Mr. Paul): A moment ago I asked you, Mr. Northcutt, whether or not you hired an attorney during the interview that you had with Mr. Cecil, when he advised you that you were not paying your non-manuals in accordance with his rules and regulations?

A. I am sorry. I thought you were referring to the Mechem employment specifically before. Following the inspection by Mr. Cecil, we hired no attorney—if that is what you mean.

Q. You made no inquiry from any source—excluding the War Department for the moment—

(Testimony of Ray H. Northcutt.)

as to your coverage or non-coverage under the Fair Labor Standards Act? A. Yes.

Q. During May, 1944?

A. Yes. You say excluding the War Department?

Q. Yes.

A. Yes. I discussed the matter with our own attorney in [216] San Francisco—excluding the War Department. The War Department, however—

Q. You talked to your own attorney in May, 1944?

A. Yes; subsequent to Cecil's first visit.

Q. What is his name? A. Grant.

Q. Is he in the private employ of your company? A. Yes, sir.

Q. Is he in private practice?

A. No, he is not in private practice. He is admitted to the Bar in Oregon and California, I believe.

Q. What was the date that you consulted him.

A. Oh, in the summer of 1944, presumably in May, I would say.

Q. Did you submit anything in writing to him?

A. No, sir.

Q. Did he submit in writing to you?

A. He has copies of all of our correspondence. Our San Francisco office had copies of all of the Official correspondence in connection with the 202 contract.

Q. I asked you a question: Did he submit any-

(Testimony of Ray H. Northcutt.)

thing in writing to you in response to your discussion?

A. No. I am sorry—I misunderstood you.

Q. At that time did you give him any job descriptions of the duties of your employees? [217]

A. At that time?

Q. Yes.

A. No, not to my knowledge. He sat in on some of our work in setting up the job descriptions earlier, on visits to Seattle.

Q. Did he have job descriptions when he was examining this problem of any of these claimants?

A. I don't know. He had the copies of the Wage Administration of the War Department — all of those files in his office—but whether he referred to them, I don't know.

Q. Did you call any job descriptions to his attention at that time?

A. Do you mean in May of '44?

Q. Yes. A. Not that I recall.

Q. When you were discussing the problem of—

A. No. I told him that I had discussed it with attorneys of the War Department and told him what their opinions were. He responded that they should know better than anyone else as to the applicability of work in the theatre of operations in the Aleutians. That is about the gist of his comment.

Q. Taking your discussions with the attorneys of the Army; when did you discuss this with them?

A. Immediately following Mr. Cecil's advice

(Testimony of Ray H. Northcutt.)

that certain portions of the overtime were not in accordance with the provisions of the Fair Labor Standards Act.

The Court: At this time we will take a 10-minute recess.

(Recess.)

The Court: Proceed.

Q. (By Mr. Paul): Mr. Northcutt, do you know the Wood group of cases which were tried before Judge Black four months ago?

A. Yes.

Q. In that case I served on Guy F. Atkinson Company interrogatories to be answered.

A. Yes, sir.

Q. Requesting that you advise the plaintiffs in that case of all written administrative rulings, interpretations, orders, and approval that you had received.

A. Yes, sir.

Q. Did you in your response list every such ruling, interpretation, approval and regulation?

A. To the best of my knowledge.

Q. Do you recall that I asked for oral approvals, regulations, interpretations and rulings that you had received? [219]

A. Oral?

Q. Yes.

A. I don't recall that. We were to bring them in to court as I recall.

Mr. Graham: I would like to offer objection to the line of inquiry here. I don't believe it is within the scope of the examination of the witness and I don't believe there is any purpose.

(Testimony of Ray H. Northcutt.)

The Court: What is the purpose of this question?

Mr. Paul: I have never before heard of his talking to either his own attorney or to attorneys in the War Department during this time. I served interrogatories during this other case and now this is brand new evidence; I never heard of it.

Mr. Graham: If your Honor please, I should like to state this: The interrogatories directed inquiries of the defendant to produce the rulings, approvals, orders, interpretations and so forth of an agency of the United States. If Mr. Paul concedes the attorney for the company, Mr. Grant, to be an agency of the United States, then I think there might be some point to his remarks. Obviously there is none. [220]

Secondly, the testimony in the Wood case clearly revealed that at all times the company, and Mr. Wood in particular, discussed all wage and labor problems with the representatives of the War Department and there was considerable discussion there as to the membership of the staff of the War Department, the District Engineer's office in reference to the attorneys there on that staff, and Mr. Northcutt testified to that on direct here.

The Court: You may inquire.

Q. (By Mr. Paul): Did you at that time write in response to my interrogatories and did you list in response to my question for all oral regulations, orders, approvals, rulings, and interpretations by an agency of the United States?

(Testimony of Ray H. Northcutt.)

A. I did not understand that we were to write up oral testimony and bring that in along with the documentary.

Q. Did you list all such?

A. I wouldn't even know how you would list oral conversation. I discussed that with you at the time we were in court and I was under the impression we had brought in everything that you expected.

Q. When was the dates of your conversations with the attorneys in the Army? [221]

A. With respect to what?

Q. With respect to the inspector's visit to your office.

A. Mr. Cecil's visit? Oh, from May, 1944 forward, over a period of considerable time. We had written directives from them and a great deal of consultation.

Q. Calling your attention to Exhibit 73 I will ask you to identify it.

A. 73 is a letter from the Wage and Hour Division of the Department of Labor from their Seattle branch office, dated September 19, 1944, signed by Mr. Neubert and directed to myself as Project Manager for Guy F. Atkinson Company.

Mr. Paul: I offer Exhibit 73.

Mr. Flood: We join in the offer.

Mr. DeGarmo: We wish to preserve, if your Honor please, the objections which are made to that offer in the Pre-trial Order.

The Court: Is it Plaintiffs' Exhibit 73?

(Testimony of Ray H. Northeutt.)

Mr. Paul: Yes, it is, your Honor.

The Court: The objections are overruled. Plaintiffs' Exhibit 73 is now admitted.

(Letter marked Plaintiffs' Exhibit Number 73 for identification.)

(Plaintiffs' Exhibit 73 received in evidence.)

Q. (By Mr. Paul): Did you at that time consult a private attorney with respect to this letter?

A. A private attorney?

Q. Yes. A. No, sir.

Q. Did you consult with the national office of the Wage and Hour Division?

A. With the national office of the Wage and Hour Division?

Q. Yes.

A. No, sir. I talked to Mr. Neubert on the phone, the local office.

Q. You talked with Mr. who?

A. Mr. Neubert, manager of the local branch office.

Q. Did you do anything with respect to this letter except with the War Department itself?

A. Yes. I explained to Mr. Neubert by telephone what our situation was and also wrote him that we were referring it to the War Department and it was our understanding that the War Department was forwarding it to Washington, and that the War Department would contact the Department of Labor in Washington, and that we would be advised by the War Department.

Mr. Paul: That will be enough. I think you have answered the question.

(Testimony of Ray H. Northcutt.)

The Court: Mr. Reporter, will you read the [223] answer to the last question?

(Last answer repeated by the reporter.)

Q. (By Mr. Paul): Is that all you told Mr. Neubert? A. Substantially, yes.

Q. When Mr. Leonard Cecil made his inspection in May, 1944, did he interview the employees?

A. Yes, sir.

Q. Were you present at any of the interviews?

A. No, sir. I told him to feel free to make his inquiries and interviews, call in the department heads and advised them to give him the freedom of the place.

Q. Exhibit 73 reads in part, "Several computations and methods for arriving at the amounts due were left with you by our Mr. Cecil, the inspector on the case. The computation shall include both present and past employees for the period for which work was being done on Contract 202."

Did you make up any computations in response to the request?

A. No, sir, except just a sample. Our office force assisted Mr. Cecil in computing some sample computations but not the survey that Mr. Cecil requested.

Q. Turning your attention next, then, to Exhibit 78, I will ask you to identify it. [224]

A. Exhibit 78 is a letter from the War Department, the Seattle office of the District Engineer, signed by J. I. Noble, Contracting Officer, dated October 3, 1944, addressed to Guy F. Atkinson

(Testimony of Ray H. Northcutt.)

Company and relates to our written referral of the matter of tabulations and computations for the Wage and Hour Division of the Department of Labor—our letter of the 21st of September.

Mr. Flood: Computations of what, Mr. Northcutt?

A. Overtime computations and various tabulations for the Department of Labor.

Mr. Flood: Pardon me please again. In response to your letter dated when?

(Previous to the last question and answer repeated by the reporter.)

Mr. Flood: The 21st of September. I didn't get the year, sir.

The Witness: 1944, sir.

Q. (By Mr. Paul): During the period between October 20th, 1943, and April 27th, 1944, I believe your testimony was that you had done a great deal of work in getting approval of certain wage rates under stabilization? [225]

A. Yes, sir.

Q. And that you held numerous conferences with officials of the Salary Stabilization Unit of the Treasury Department and with the Regional Office of the War Labor Board?

A. That is correct.

Q. And during that period you made a study of Executive Order 9250?

A. Yes, we did, and in regard particularly to the matter of increased and decreased adjustments.

Mr. Graham: If your Honor please, may I interject? Do I understand counsel is now leaving

(Testimony of Ray H. Northcutt.)

his inquiry with reference to Exhibit Number 78?
I would like to offer the same, your Honor.

The Court: Whose Exhibit 78 is it?

Mr. Paul: Defendants' Exhibit 78. We have no objection.

The Court: The Defendants' Exhibit 78 is now offered. Is there any objection?

(Letter marked Defendants' Exhibit 78 for identification.)

Mr. Flood: I object at this time, your Honor, because it was merely identified with respect to address or addressee and date. Its contents do not at this time appear to be either relevant, competent [226] or material. It is offered in the stipulation as a rebuttal exhibit. At this time it is neither competent relevant nor material. I object to it.

Mr. Graham: The testimony of this witness on cross-examination certainly made it material. His attention was directed to what it was and what it was in response to.

Mr. Flood: Nothing indicated its relevancy.

The Court: I want to know his answer to the question with regard to Exhibit 78 as to whether it was the only response of the witness' referral of the Neubert letter to the War Department. Isn't that what the question is? I want to hear this witness' answer to that.

Mr. Paul: I don't believe the question was ever answered, your Honor.

The Witness: No, it was not.

The Court: The witness says it was not.

(Testimony of Ray H. Northcutt.)

Mr. Graham: That is my recollection.

The Court: It was not made?

Mr. Graham: No, your Honor.

The Court: Proceed.

Q. (By Mr. Paul): During the year 1944, was this the only— [227]

The Court: I meant to proceed with the reading of the record.

(Testimony with regard to Exhibit 78 repeated by the reporter.)

Mr. Graham: Your Honor, that is why I adverted to Exhibit 78 because it seemed he was leaving it at this point.

The Court: It seems it has not been sufficiently identified.

Proceed.

Q. (By Mr. Paul): What other direct response did you have to the forwarding of the Neubert letter to the War Department?

A. You mean other than the War Department's letter of October 3, 1944, Exhibit 78?

Q. Yes.

A. We subsequently received advice from the War Department in writing the dates of which I do not recall from memory. It was some time before—Exhibit 78 closes with the paragraph that we—

Mr. Flood: I object to any testimony with regard to Exhibit 78. In the first place, it speaks for itself and in the second place it isn't in evidence [228] yet.

(Testimony of Ray H. Northcutt.)

The Court: You cannot state the contents of it.

Mr. Paul: I will withdraw and reframe my question if I may.

The Court: You may.

Q. (By Mr. Paul): During 1944, what other direct response did you have to your forwarding of the Neubert letter to the War Department in writing?

A. Direct response to the Neubert letter, later than the Exhibit 78 in 1944?

Q. Yes.

A. I don't recall whether the next written response from the War Department was prior to the end of 1944 or not. I believe it was early in 1945.

Q. After your receipt of the Neubert letter on September 19th, 1944, during September, October and November of 1944, did you do anything else than you have heretofore testified with respect to the contents of the Neubert letter?

A. Yes, sir.

Q. What was that?

A. Contacted the War Department by telephone and in conferences on numerous occasions to inquire if they had [229] had any response from Washington on the referral of the matter.

Q. Anything else?

A. That is all. We had no further inquiry from Mr. Neubert's office, so we simply reminded the War Department that we were still waiting for further instructions.

(Testimony of Ray H. Northcutt.)

Q. You took no other steps to protect any possible liability against your company?

A. Not at that time.

Q. Going back to the period from October 20th, 1943, until April 27th, 1944, you have previously testified that you had numerous conferences with stabilization agencies and some familiarity with Executive Order 9250? A. Yes.

Q. Are you familiar with that portion of Executive Order 9250 which deals with the Fair Labor Standards Act?

A. My attention was not particularly called to it at that time. I have since become familiar with it. The matter of Fair Labor Standards was not raised by either the War Labor Board or the Treasury Department or the War Department by any of the participants in the preparation and submission of the salary schedules.

Q. The stabilization agency was concerned solely with stabilization matters? [230]

A. I don't know but the Fair Labor Standards was not mentioned at any time.

Q. There was no promise or assertion made by any of those agencies to you relating to the Fair Labor Standards Act?

A. No reference whatever was made to the Fair Labor Standards Act at that time to my knowledge.

Q. Your testimony is that your attention was not directly drawn to the section of Executive Order 9250 relating to the Fair Labor Standards Act? A. No, sir.

(Testimony of Ray H. Northcutt.)

Q. Even though you had been dealing with it for several months?

A. Well, we had not been dealing with it for several months, no.

Q. From the period September, 1943 to April, 1944?

A. We were not dealing with the Fair Labor Standards Act at that time.

Q. Well, with Executive Order Number 9250?

A. Oh—yes, sir.

Q. You were furnished with a copy of Executive Order Number 9250 during that period, were you not?

A. Yes, I think we were, and we also made frequent reference to certain provisions of Executive Order 9250 in the regulations of the War Department auditors adjacent to [231] our office.

Q. Executive Order 9250 was available during that period of time? A. Yes, sir.

Q. Directing your attention to Exhibit 35, to the last paragraph on page 2, and particularly to the sentence beginning on the sixth line which reads as follows:

“As pointed out in our preliminary submission dated February 2nd, and in our letter to the United States Engineer Department, dated January 28th, the Government’s Project Auditor is nevertheless withholding reimbursement of all payroll amounts involved, on the theory that failure to seek approval of the War Labor Board or the United States Treasury Depart-

(Testimony of Ray H. Northcutt.)

ment, might be construed as contravention of the provisions of Executive Order Number 9250."

Was it your testimony yesterday that for all time prior to April 22nd, 1944, your wages were paid in strict accordance with Circular Letter 2236 and 2390? A. Yes, sir.

Q. Is it not true that notwithstanding such payment in accordance with those two circular letters, that the Army auditors were withholding certification for reimbursement because of lack of compliance in certain [232] details with 9250?

A. No. This might more correctly be stated that the Waar Department auditors had threatened to withhold unless any revisions or adjustments in the schedules were handled in accordance with Executive Order 9250.

Q. But those revisions and adjustments were within the salary ranges listed in Circular Letter 2236 and 2390, were they or were they not?

A. Repeat your question, please.

(Last question repeated by the reporter.)

Q. (By Mr. Paul, continuing): With those revisions.

A. Not the ones that we were submitting for approval, no. I would almost have to cite you an example, I think, to illustrate what you are driving at.

Mr. Graham: I suggest that the witness be permitted to answer the question and explain the answer, your Honor.

(Testimony of Ray H. Northcutt.)

The Court: He may answer the question. Do you feel that it is necessary to do that in order to adequately speak your information as to the truth in responding to that answer?

The Witness: Perhaps Mr. Paul has other questions in mind which will bring it out but the question as stated doesn't describe the adjustments in revisions—in his question they are not sufficiently [233] described for me to answer. There were various kinds of adjustments and revisions that we had proposed to be made and the War Department Contracting Officers consulted with their attorneys and the War Department's auditors as to—

Mr. Flood: That I object to, your Honor, and move that it go out—I mean the War Department auditors and all statement with respect thereto by this witness are not only unresponsive but incompetent. I move it go out on both grounds.

The Witness: I cannot answer Mr. Paul's questions as to these particular revisions without describing the revisions.

A. (Continuing): There were various kinds of revisions contemplated, some of which the auditors maintained would not comply with 9250, and some of which did. Certain revisions were not made on this account but they were in the minds of the auditors.

Q. (By Mr. Paul): Was certain figures of payrolls delayed during January and February, 1944?

A. I do not believe they were actually delayed but at the time this letter was written it was impending.

(Testimony of Ray H. Northcutt.)

Q. Calling your attention to Exhibit 30, and calling your attention to page 3 of that exhibit for identification, [234] to the first paragraph thereof and particularly the last two sentences.

A. Yes, sir.

Q. Is it not true that certification for reimbursement was being delayed because of problems arising under 9250?

A. Delay of reimbursement was the same condition as prevails here, as I have described. It was actually impending. There was at this time, as yet, no authoritative unanimity of opinion between the War Labor Board, the Treasury Department, and the War Department's own auditors as to the proper course of procedure under 9250.

I would like to add that that concerned not only salaries and wages but actual titles and designations; this submission involved the use, under the new contracts in the Aleutians, some assignments and—

Mr. Flood: I object to this, your Honor. The question was whether or not payments had been withheld. All of this matter to which the witness is now testifying is unresponsive and is volunteered.

The Witness: There were two reasons why there were not—

The Court: The objection is sustained. It is [235] better to proceed by question and answer rather than by too much discussion.

The Witness: Yes, sir.

(Testimony of Ray H. Northcutt.)

Q. (By Mr. Paul): Your testimony yesterday was that prior to April 27th, 1944, you conformed to Circular Letters 2236 and 2390, is that not true?

A. Yes, sir.

Q. And the changes giving rise to this reimbursement trouble as you wrote in Exhibit 30 were—or were they not—still in accordance with Circular Letter 2236 and 2390?

A. What changes do you mean now — the changes contemplated?

Q. Yes.

A. Well, Executive Order 9250 specifically governed these changes and adjustments.

Q. You haven't answered my question as yet.

A. I am at a loss to understand just what you mean by your question.

Q. I want to know whether the adjustments giving rise to your reimbursement problem in January and February, 1944, were or were not in accordance with Circular Letter 2236 and 2390?

A. Well, we had not made the adjustment yet. Circular [236] Letters 2236 and 2390 in my estimation were not necessarily in conflict with Executive Order 9250, but the adjustments—even in conformity with 2236 and 2390, according to our understanding, had to meet the test of Executive Order 9250; but neither the War Labor Board nor the Treasury Department nor the War Department auditors had been able to as yet tell us authoritatively how to proceed with those adjustments.

Q. You mean how to make application, even

(Testimony of Ray H. Northcutt.)

though the adjustments were still in conformity with 2236 and 2390?

A. I think that is a correct statement of the problem.

Q. That is what the Army meant when they wrote you on October 20th, 1943—

Mr. Flood: I object to testimony from this witness as to what the Army meant by any exhibit, your Honor. I object as the exhibit speaks for itself.

Mr. Graham: Then the question should not ask for it.

The Court: Does Mr. Paul insist upon the answer to the question?

Mr. Paul: No. I will not require it.

Mr. Graham: May I be excused from attendance in court this afternoon? Mr. Hull and Mr. DeGarmo from my office will be here in my place.

The Court: Is there any objection to that?

Mr. Flood: He is very welcome.

The Court: That will be satisfactory, Mr. Graham.

Court is now recessed until 2:00 o'clock this afternoon.

(At 12:02 p.m., Wednesday, December 10, 1947, proceedings recessed until 2:00 p.m. in the United States Court House.) [238]

Seattle, Washington

December 10, 1947, 2:00 p.m.

(All parties present as before.)

The Court: You may proceed.

(Testimony of Ray H. Northcutt.)

Mr. Paul: I am through with my own cross-examination.

The Court: Mr. Flood may inquire.

Miss Krug: Your Honor, I wish the record to show Mr. Flood's cross-examination to include my clients. He may increase his cross-examination to that extent.

Mr. DeGarmo: I think it was understood in the stipulation that any cross-examination by any counsel would bind all of the parties.

RAY H. NORTHCUTT (Resumed)

Cross Examination

By Mr. Flood:

Q. You are Vice-President of the Guy F. Atkinson Company? A. Yes, sir.

Q. How long have you served as Vice-President?

A. About five years. [239]

Q. On what date—just a summary—on what date was the prime contract here in evidence as Defendants' Exhibit 13 executed between your company and the War Department?

A. September 30th, 1943.

Q. You were then Vice-President?

A. Yes, sir.

Q. Did you leave the company's service to enter the Military Service? A. Yes, sir.

Q. When was that?

A. About the end of September, 1944 to the first of March, 1946.

Q. In what branch of the service did you serve?

(Testimony of Ray H. Northcutt.)

A. The Navy. I was Contracting Officer for the Bureau of Supplies in Washington, D. C.

Q. And did you serve during all of that time in Washington, D. C.? A. Yes, sir.

Q. During that time you gave your primary attention to the tasks involved in your Navy service, did you not? A. That is right, sir.

Q. And only such incidental time as you had to correspondence received from your company?

A. That is right, with the exception of some conferences [240] called by the War Department.

Q. War Department or Navy Department?

A. War Department, Chief of Engineers, while I was in the Navy service.

Q. To attend those conferences you would be excused from your naval duty?

A. That is right.

Q. Did I understand you had an office in the Pentagon Building?

A. No. I was in the Navy Department in Washington.

Q. You were assigned to an office there?

A. Yes, that is correct.

Q. And you spent your time there daily?

A. That is right.

Q. At the inception of these war contracts, I understood you to say yesterday before you entered into these war contracts, it is correct is it, that you and your company made an inquiry to determine whether or not the employment involved was covered by the Fair Labor Standards Act?

A. I do not recall that we made inquiries at the

(Testimony of Ray H. Northcutt.)

time of negotiation. I stated that we had inquired, —I was asked I believe what our understanding was before we entered into these contracts, with construction work generally, and with regard to these contracts [241]

Q. Before you made a determination with respect to that inquiry, did I not understand you to say yesterday that you or your company consulted your attorneys with respect to whether or not you were covered under the Act? A. Yes, sir.

Q. Do you remember when that consultation took place? ?

A. Oh, about nineteen hundred and—some time in 1941 while we were engaged in the construction of Mud Mountain Dam.

Q. Was that in Seattle, San Francisco, or elsewhere? A. The Dam is about 50 miles—

Q. I mean the consultation with your attorneys?

A. I was at Mud Mountain Dam about 50 miles from Seattle and our attorneys were in San Francisco.

Q. Did you consult them orally or in writing?

A. In telephone conversations. We had bulletins from the National office of the Contractors Association generally and I inquired from our attorneys as to their possible application to our construction work.

Q. And the bulletins from the office of what—the

A. The offices of the Associated General Contractors.

Q. Those questions related to the question of

(Testimony of Ray H. Northcutt.)

coverage under the Fair Labor Standards Act of employments in these various contracts? [242]

A. No; employment in construction work generally.

Q. Would that apply just to Mud Mountain Dam or would it apply to Excursion Inlet and the Aleutian Islands?

A. That was before the Excursion Inlet work or Aleutian Island work was contemplated by us,—shortly prior to that.

Q. Then before entering into the contracts at Excursion Inlet or the Aleutian Islands, did you or your company ever make inquiry as to your coverage of employment under the Fair Labor Standards Act, at any time prior to the time you executed the contract?

A. Not that I recall. During the negotiations of the contract.

Q. That wasn't my question. Did you at any time before you executed the prime contract here in evidence as Exhibit 13 ever make any inquiry about the coverage of your employees in their employment under the Fair Labor Standards Act?

A. Our knowledge of that did not come by inquiry. It came by voluntary information to us.

Q. Did you ever make any investigation or inquiry as to whether your employees would be covered by the Fair Labor Standards Act?

A. At what time, sir?

Q. At any time prior to the execution of the prime contract [243] here in evidence as Exhibit 13?

(Testimony of Ray H. Northcutt.)

A. No, we did not make inquiry as to the coverage—

Q. Your answer is no? A. That is correct.

Q. Now, do you want to say anything more?

A. I think a complete statement would be this—

Q. “No” is not a complete statement. A. No.

Q. All right, go ahead and amplify it as much as you wish. A. We did not make inquiry—

Q. Or investigation?

A. —during the negotiations of these Alaska contracts, prior to their execution. Our information as to—

Mr. Flood: I move to strike any reference to information. It isn't within the scope of my question.

A. (Continuing): Very well. We did not make direct inquiry during the negotiation of these and prior to the execution of the contracts, as I recall.

Q. (By Mr. Flood): Did you make any investigation as to whether your employees under the individual contracts of employment executed pursuant to the prime contract were or were not covered by the Fair Labor Standards Act after the date of execution? [244] A. Yes.

Q. When did you first make that and I will ask you: Did you make any investigation with respect to whether or not your employees under the individual contracts of employment, pursuant to the prime contract, were or were not so covered?

A. As I testified this morning, we investigated that about May, 1944.

(Testimony of Ray H. Northcutt.)

Q. That was the first investigation that you made?

A. The first direct investigation on our own account.

Q. On your own account?

A. Yes, sir. Prior to that we took the instructions of the War Department.

Q. And there is no further information with regard to that investigation that you can give us now that you did not give us this morning?

A. Oh, yes, there is a great deal more. Mr. Paul asked me this morning if there was anything further beyond that and I said that there was.

Q. Did you do anything further besides consulting Mr. Grant, your attorney in San Francisco, to ascertain whether you were or were not covered under the Fair Labor Standards Act?

A. Oh, yes; as I stated this morning I consulted with the attorneys and labor relations men of the War [245] Department.

Q. I believe you testified in your testimony, if I recall it correctly, that you did not try further to ascertain whether or not you were covered other than to consult your attorney, Mr. Grant, in San Francisco, and the officials of the War Department?

A. That wasn't what I was asked this morning.

Q. You said that wasn't what you were asked this morning. I have the right, I think, to ask a further question. Did you ever consult the officials of the Wage and Hour Division or any official under the Fair Labor Standards Act with respect to whether or not you were covered?

(Testimony of Ray H. Northcutt.)

A. No, sir. My testimony was given on that this morning. We had no further contacts with the Wage and Hour Division either from us or from them at that time.

Q. There isn't much more to add to that than "no" is there,—you did not? A. No, sir.

Q. When you consulted Mr. Grant, did you submit anything to Mr. Grant in writing?

A. No, sir.

Q. No inquiry of him in writing?

A. No, sir.

Q. And you did not ask for an opinion of him in writing? [246]

A. No, sir. As I said before, he had all of our papers and correspondence in connection with these contracts.

Q. In San Francisco? A. Yes.

Q. Did you discuss it with him in San Francisco or Seattle? A. Both.

Mr. DeGarmo: It seems to me that while several of counsel might have the right to cross-examine that it should be limited to a different matter than was already covered. This was already covered once on cross-examination. The stipulation is that the cross-examination of one party shall be the cross-examination of all. We are now going over exactly the same ground we went over this morning. I object to it on the ground that it is not proper cross-examination, it having once been covered and it is repetition.

The Court: Do you refuse to be bound by the stipulation?

(Testimony of Ray H. Northcutt.)

Mr. Flood: I don't refuse to be bound by any stipulation that I entered into, your Honor, but I do not understand the stipulation to bind me to waive making inquiries which I think are right for my clients.

The Court: Mr. DeGarmo, if you think the stipulation has that effect will you point out the language and we will consider it. [247]

Mr. DeGarmo: I don't think there is anything in the stipulation which says that only one of counsel may cross-examine. My point is that once a witness has been examined on a precise point it is not proper cross-examination for someone else to cover the precise point a second time. If that is not true, then each of counsel at this table could go over it one after another. That, to my mind, is not within the province of cross-examination.

The Court: In general cases, the result although extravagant in time is assured to each defendant. I am not prepared at this time to rule that—

Mr. DeGarmo: May I read from the Pre-trial Order,—this portion of it?

The Court: I understood that you were—

Mr. DeGarmo: "All evidence, documentary or oral relating to any one of the defendants shall be deemed to relate to all of the defendants and all documents or communications received by one defendant shall be deemed to have been received by and come to the attention of and within the knowledge of all other defendants. All information, knowledge, beliefs, and actions of any of the de-

(Testimony of Ray H. Northcutt.)

endants shall also be deemed to be the information, knowledge, beliefs and actions of all other defendants." [248]

I think there is a later statement here.

The Court: There is a statement in there I think about whether one party not represented by the examiner may have the benefit of the questions and answers of the examiner obtained by and through the examiner representing another party.

Mr. DeGarmo: No, I believe there is no direct stipulation that only one counsel can examine on the same subject matter and, if the court permits it to be done, I will withhold objection. It seems a waste of time to cover it the second time.

The Court: It isn't a matter of the Court's wish,—it is a matter of the defendant's right which is involved. I know of nothing here which cuts short the right of plaintiff to do it. I may get into a position where I may join counsel in being sorry, but that is the case where it has been gone over, if it has been. Nevertheless, the right exists and therefore I believe this line of questioning may proceed.

Q. (By Mr. Flood): Did you ever at any time after the execution of the prime contract—which I think was in September, 1943—is that right?

A. Yes, sir.

Q. 1943; did you ever receive a written opinion from any [249] official of the government advising you or stating to you that the Fair Labor Standards Act did not apply to your project?

A. No, sir. Until what date?

(Testimony of Ray H. Northcutt.)

Q. Well, we will say until after the present moment. A. Oh, yes.

Q. From September, 1943 until the present moment?

A. Oh, yes,—that it did not apply to Contract 202.

Q. Do you have those opinions in your file?

A. Yes, sir.

Q. You probably don't have them with you?

A. They are among these exhibits, I believe.

Q. Can you select any writing to be found among the exhibits which advises you that the Fair Labor Standards Act did not apply to your project?

A. Yes, sir; several of them.

Q. Will you do so?

The Court: In my statement just a moment ago I think in effect I said it was more of a defendant's right. In this relationship I meant plaintiff's right and I ask the reporter to substitute the words "plaintiff's" for "defendant's."

You may proceed.

Mr. DeGarmo: I could probably hasten it by calling his attention to the documents he is probably [250] looking for.

The Court: Is there any objection?

Mr. Flood: No objection.

Mr. DeGarmo: Will you look at Document 59? I think that is the one that you are probably looking for.

Q. (By Br. Flood): Are there any others?

A. Yes, there are others on the same subject. This Exhibit 59 is the first one I had.

(Testimony of Ray H. Northcutt.)

I presume they are in these exhibits.

Mr. Flood: If Counsel knows of any others I am perfectly willing to have him assist you in identifying them.

Mr. DeGarmo: There are some instructions on the handling of litigation claims which include Fair Labor Standards Act cases, which are in the exhibits. I think Exhibit 79 also—

The Witness: Yes, I just came to that,—Exhibit 79.

Mr. DeGarmo: —deals with the same subject.

Mr. Flood: Is it in evidence, Counsel?

Mr. DeGarmo: I think it has not yet been offered except as it is offered generally by the stipulation. [251]

Mr. Flood: I think there are others.

The Witness: There are others. I recall—

Mr. Flood: Are there any others in evidence? I just want to find, Counsel, anything that you have.

Mr. DeGarmo: I don't think I have it at the fingertips of my memory any more than the witness has them at his, so I can't readily pick them out.

Q. (By Mr. Flood): Those are the only two that you can find?

A. Yes. There are others, though, to my knowledge. I don't recall the specific phrasing of some of them, but as to their dates and identity, we had them at the other trial.

Mr. Flood: At this time, your Honor, I am going to ask leave to read Exhibit 59 which the witness has just identified.

(Testimony of Ray H. Northcutt.)

The Court: Has it been received in evidence?

Mr. Flood: I now move its admission.

The Court: Defendants' Exhibit 59 is offered.

Is there any objection?

Mr. DeGarmo: You now move the admission of which document?

Mr. Flood: 59.

Mr. DeGarmo: No objection. [252]

The Court: It is now admitted.

(Defendants' Exhibit 59 received in evidence.)

Mr. Flood: (Reading Defendants' Exhibit 59):

"February 7th, 1945. Guy F. Atkinson Company, 1524 Fifth Avenue, Seattle, Washington. Subject: Claims for Additional Compensation under Fair Labor Standards Act.

"Gentlemen:

"By letter dated 3 October 1944 from the Contracting Officer, information was furnished to your office outlining the efforts of this office to establish an administrative policy for guidance in handling claims for additional compensation based on Fair Labor Standards Act regulations.

"In response to our inquiry, the Office, Chief of Engineers, has recently reaffirmed previous instructions that regulations of Circular Letter 2390 are currently applicable to operations of cost-plus-a-fixed-fee contractors.

"In view of these instructions, claims based on alleged violations of the Fair Labor Standards Act

(Testimony of Ray H. Northcutt.)

shall continue to be denied [253] by the contracting officer.

“It is recognized that our continued refusal to admit the validity of claims for such additional compensation may result in more formal litigation through an attorney or Civil Court action. In the event formal suit is filed against the contractor, the procedure outlined in letter dated 8 December 1944 shall be observed. If a claim is made in writing but without recourse to a court of law, the claim is to be referred to the Contracting Officer accompanied by any related information. This office will then proceed to investigate the claim and issue instructions to assist you in preparing and appropriate reply to the claimant.

“In any event, upon receipt of formal notification from your office of the claim or law suit intended to recover additional compensation, this office will initiate any action necessary. Special instructions governing your part in handling these claims will also be furnished to you at that time.

“Very truly yours,

“D. M. PELTON, CAPTAIN,
Corps of Engineers,
Contracting Officer.” [254]

Counsel yesterday read into the record an excerpt from the exhibit. May I ask leave to read into the record an excerpt from Exhibit 59?

The Court: You may do so.

Mr. DeGarmo: I thought counsel had.

(Testimony of Ray H. Northcutt.)

The Court: You have read the whole letter, have you not?

Mr. Flood: Yes.

The Court: The reporter will copy the whole letter into the record at this place. That accomplishes the desire.

Mr. Flood: Exhibit 79, which the witness identified—which is so long I will not read it in full—

The Court: Has it been received in evidence?

Mr. Flood: I now offer Exhibit 79.

The Court: Is there any objection to the offer?

Mr. DeGarmo: No, I have no objection to the offering of 79.

The Court: That exhibit is now admitted and you may read all or any part of it at this time or later.

(Letter marked Defendants' Exhibit 79 for identification.) [255]

(Defendants' Exhibit 79 received in evidence.)

Mr. Flood: It is from the "War Department, Office of the Chief of Engineers, Washington, D. C." It is dated "9 November 1945, To: The District Engineer, U. S. Engineer's Office, Seattle, Washington. Subject: Fair Labor Standards Act Litigation Against Cost-plus-a-fixed-fee Contractors."

Paragraph 3 thereof reads:

"Pursuant to the foregoing the Judge Advocate General has advised that the contractors should be instructed by the Contracting Officer to employ

(Testimony of Ray H. Northcutt.)

private counsel in the following pending cases under the supervision of your office: Frances E. Mix, et al vs. West Construction Company; Frank C. Murray, et al vs. Guy F. Atkinson Company; Vernon E. Tyler et al vs. S. Birch & Sons Company; Charles W. Wood, et al vs. Guy F. Atkinson Company.”

“4. The change in procedure affected by this revised agreement is effective immediately. Therefore, it is imperative that these instructions with respect to the employing of private counsel be conveyed to and acted upon [256] by the several contractors at the earliest possible date. The name and address of the private counsel selected thereupon should be forwarded directly to this office by the Contracting Officer by teletype.

“5. Private counsel should be advised to contact the local United States Attorney at once and work out the details of the transfer. It is pointed out, however, that the United States Attorney will not be in a position to withdraw formally from the case until instructed to do so by the Department of Justice. Such instructions will be issued as soon as the Department of Justice is advised, through this office, of the name and address of private counsel. By the terms of the revised agreement substitution of counsel in these cases must be accomplished by 1 December 1945.”

Then paragraph 7 thereof reads:

“7. It should not be inferred from paragraph 3 of the enclosed copy of the Judge Advocate Gen-

(Testimony of Ray H. Northcutt.)

eral's memorandum that reimbursement of private [257] counsel fees in these cases has been approved or guaranteed by the War Department. Although normally the amount of any judgment, costs and fees of authorized private counsel in a case brought under the Fair Labor Standards Act is reimbursable to the contractor, no change in the procedure for determination of reimbursability has been brought about through the revised agreement. This is still the responsibility of the contracting officer and is a decision to be made by him after securing the comments of this office as required by O&R 75022 g. Reimbursement for settlement of claims and litigation."

The Court: What concern or person is the addressee of that letter?

Mr. Flood: The District Engineer, United States Engineer's Office, Seattle, Washington, from the War Department, Office of the Chief of Engineers, Washington, D. C.

Q. (By Mr. Flood): Now, Mr. Northcutt, you never received any letters from any official of the government during the progress of the work and the course of the project, [258] Contract 202, other than instructions as to how to dispose of claims that were already in litigation, did you?

A. Do you mean bearing on the Fair Labor Standards Act, exclusively?

Q. Yes.

A. Well, some of the earlier instructions simply stated that these claims were to be denied and

(Testimony of Ray H. Northcutt.)

subsequently we had instructions as to the procedure for handling, of which Exhibit 79 was not the first.

Q. You never received any instructions from any official of the War Department, then, except with relation to claims in litigation, did you?

A. Yes. They referred to claims that had not reached the stage of——

Q. Litigation? A. Yes.

Q. Claims that had been filed with you?

A. Yes. Claims under the Fair Labor Standards Act were to be denied,—not necessarily claims in litigation.

Q. When was the first such letter received?

A. I don't recall except that it was some time considerably prior to Exhibit 79 of November 5, 1945.

Q. Was there any received prior to Exhibit 59 which was dated the 7th of February 1945? [259]

A. I would say that 59 was probably one of the first of its kind.

Q. Prior to that date you had never received any opinion in writing or letter in writing with respect to whether your project was or was not covered under the Fair Labor Standards Act?

A. I do not recall, sir, that we did.

Q. Did you ever submit to the War Department or any official of the War Department including the Contracting Engineer or the Chief of Engineers, a report in writing describing the duties which the employees—Group B employees—

(Testimony of Ray H. Northcutt.)

performed on the project? A. Yes, sir.

Q. Is any such letter in evidence?

A. They are incorporated at considerable length and detail in the submission to the Wage and Hour Administration Agency of the War Department which has been discussed considerably.

Q. Is that included in any exhibit here in evidence? A. Yes, sir.

Q. Which exhibit, for example, if you know?

A. I can't identify them by number. We have been talking about them here for two days.

Q. Can you describe them so that we can identify them? A. Surely. [260]

Q. Would Exhibit 42 answer your description?

A. Yes, they are embodied in that.

Q. Could you conveniently mark the pages that you rely upon?

A. Yes, sir; job descriptions, non-manual employees.

Q. You were referring to job descriptions?

A. Yes, that is right.

Q. You furnished no other information than that contained in Exhibit 42 described as job descriptions, did you?

A. That was the combination of the preparation of the submission to the War Department Wage Administration Agency.

Q. Did you in writing, furnish any other description than that contained in Exhibit 42, marked Job Descriptions?

A. Yes, preliminary to that. This is a boiled-down result of about two months' work.

(Testimony of Ray H. Northcutt.)

Q. Was there information about the duties to be performed or performed not contained in Exhibit 42?

A. Yes; but I think it is pretty well summarized in that.

Q. Is there any fact which you furnished in writing that is omitted in 42?

A. I wouldn't know; I don't think there is anything pertinent that is——

Q. Do you have the correspondence available?

A. It may still be in either our files or the War Department's. As I say, what you have there summarizes it. There [261] was voluminous——

Q. Are you satisfied with the description contained herein?

A. For the purpose for which that is intended, yes.

Q. And you submitted it for approval under the Wage Stabilization Act, did you not, of certain salaries and increases to be allowed?

A. Yes, sir.

Q. And for no other purpose?

A. No, sir. Well, yes, for another purpose,—to obtain—the actual employment also had to be approved. It served that purpose, too. Each individual employment had to be supported by an employment status form which set forth the individual's past experience and present duties.

Q. This is just a description of the job classification?

A. No. It was a statement of employment

(Testimony of Ray H. Northcutt.)

status form was the name of it. They were submitted on each employee for his initial hire, before he could be hired. We had to obtain approval by the War Department of the employment and for the work and at the salary set forth on the employment status form. Each change of assignment, re-classification, even if it involved only change in classification and duty and no change in rate——

Q. I haven't been stopping you but I think that is entirely [262] beyond the question.

Have you ceased, anyway?

A. Well,—as you wish.

Q. If not, I prefer that you limit your answers to the scope of my question.

A. I was intending only to give you the information asked for.

Q. You were giving me no information other than which is contained in the many pages of the certificate, were you?

A. Yes. You asked me if we gave other information as to the duties of the employees.

Q. And it was also submitted for the approval of the Wage Stabilization Agency,—for their approval of the schedules?

A. No. You asked me if there were any other submissions of the duties of employees. There were for the purposes I was describing.

Q. To whom?

A. To the War Department.

Q. In writing? A. Yes.

(Testimony of Ray H. Northcutt.)

Q. Other than what is contained in the exhibits here in evidence?

A. Well, they happen to be,—samples of them are in one [263] exhibit, here.

Q. Which one?

A. Exhibit 35 contains samples of the "Statement of Employment Status" which describes briefly the job designation.

Q. You referred to 35. Is that the letter of Guy F. Atkinson Company to Frank Mechem?

A. That is right.

Q. All right.

A. Now, this sets forth——

Q. It speaks for itself and I am not asking you to tell me what it sets forth. A. O.K.

Mr. Flood: Getting back to Exhibit 42, if Your Honor please, I shall read from——

The Court: Is it in evidence?

Mr. Paul: It has been offered by the defendants in the stipulation.

Mr. Flood: I prefer to offer it right now and dispose of any objections to it. I offer Exhibit 42.

The Court: Defendants' Exhibit 42. Is there any objection?

Mr. DeGarmo: No, we have no objection except I am afraid we are going to be in a hopelessly confused [264] state as far as these exhibits are concerned, inasmuch as we are doing it contrary to the stipulation.

The Court: I am trying to avoid any confusion. This offer is agreeable to the court. Is there any objection to it? It is admitted.

(Testimony of Ray H. Northcutt.)

(Defendants' Exhibit 42 received in evidence.)

Mr. Flood: Reading from the exhibit,—particularly from job descriptions, page XII-4, "Time Checker—Checks employees on and off shift and makes periodical checks in the field.

"Timekeeper, Chief—Instructs, supervises and reviews the work of subordinates engaged in the physical timekeeping of the contractors' employees. Prepares the time rolls, settles discrepancies in time records and provides necessary cost distribution.

"Timekeeper, Assistant Chief—Works under the supervision of the Chief Timekeeper. Is in direct charge of timekeepers and time checkers on a designated shift.

"Timekeeper—Keeps and maintains time records of contractors' employees and prepares preliminary reports therefrom and certifies same to superior.

"Accountant—Instructs, supervises, reviews and is responsible for the work of subordinates engaged [265] in the compilation of reports on receipts, expenditures and other financial transactions.

"Accountant, Assistant—Under the direction of the Accountant, supervises one or more of the functions of the Accounting Department."

Q. (By Mr. Flood): Now, Mr. Northcutt, that job description was submitted prior to the actual employment of any of the plaintiffs herein, was it not?

(Testimony of Ray H. Northcutt.)

A. Not this job description, no, sir.

Q. What date does that bear?

A. What was that number?

Q. Number 42. A. April 20th, 1944.

Q. Did you ever submit to any official of the War Department, including the District Engineer, the Chief of Engineers, any description of the duties that were actually performed by any of the plaintiffs to this action?

A. Do you mean after they were employed?

Q. Yes.

A. Individually and specifically as the individual does thus and so, without regard to a general submission such as this?

Q. Yes. You are familiar with the plaintiffs in these consolidated [266] actions, are you not?

A. Some of them.

Q. Are you familiar with all of them?

A. Most of them. I knew most of them personally.

Q. Did you then, after their employment, submit a description of the tasks and duties performed by any of the plaintiffs in this action to any official of the War Department including the Chief of Engineers or the District Engineer or the Contracting Officer? A. Yes, sir.

Q. As to which ones? A. All of them.

Q. In writing? A. In writing.

Q. By any communication in evidence here amongst the exhibits? A. I do not think so.

Q. Was that during the course of their employ-

(Testimony of Ray H. Northcutt.)

ment of subsequent to the cessation of their employment and connection only with the litigation?

A. The one I am thinking of is in connection with the litigation.

Q. After the employment had ceased?

A. Yes. That applies to all of them. There were probably others prior to that in connection with re-classifications [267] or changes of rates.

Q. As to such you are not familiar with any particular application?

A. There are probably some which may apply to individuals concerned here.

Q. You are not familiar with any particular one; if you are, you may speak of it.

A. Not offhand, no. As I say, every rate classification and every change of rate required some such admission.

Q. Now, are you familiar with the tasks performed by these particular plaintiffs which you say were in connection with the claims after they had reached the stage of litigation and to whom did you make that submission?

A. I believe to the War Department for transmittal to the United States Attorney's office who were handling the defense of the claims.

Q. That was purely information for the preparation of the defensible litigation?

A. That preparation; yes, sir. Any other preparation would be for the purpose of approval of employment reclassification.

Q. Did you at any time after the employment

(Testimony of Ray H. Northcutt.)

of any of these plaintiffs submit a description of the tasks or duties performed by any of these plaintiffs to any representative or official of any agency of the United [268] States for the purpose of determining whether they were or were not included or covered under the terms of the Fair Labor Standards Act? A. No, sir.

Q. You are familiar with Exhibit 13, the prime contract between the company and the War Department? A. Yes, sir.

Q. I will ask you to examine Article I, section 1.a. Examine Article II, section 1.a., and Article V, Section 1.b, if you are familiar with it.

A. I don't have it memorized, I assure you.

Q. After you have done so, I will ask you to return it to me, please. (Document handed to the witness for inspection.)

A. Yes, Article II, Section 1.a, and Article V, Section 1.b.

Q. Now, all of your labor costs were reimbursable, were they not, by the government?

Mr. DeGarmo: I object to that, if Your Honor please, upon the ground it is contrary to the written document which counsel has been inquiring with respect to.

The Court: The objection is overruled.

A. No, sir, they were not. [269]

Q. (By Mr. Flood): Which ones were not?

A. Only those which,—in effect they were but I cannot state that all of our labor costs were reimbursible. All of the labor costs which were ap-

(Testimony of Ray H. Northcutt.)

proved by the War Department's auditors were reimbursible.

Q. Did you ever have any account denied or rejected by the War Department that fell in any of the following classes:

“All labor, materials, returnable containers and reels, machinery, power and fuel necessary for either temporary or permanent use for the benefit of the work”;

were any claims for any of those matters ever turned down for reimbursement by the War Department?

A. Yes, under certain circumstances.

Q. Under what circumstances?

A. Any mechanical errors.

Q. Auditing errors?

A. Mechanical errors of computation were not reimbursible.

Q. That is, your own inter-office audits were subject to correction by the War Department?

A. That is correct.

Q. They were not turned down in principle, were they?

A. Not as long as they passed the test of the government's regulations. [270]

Q. Not as long as they passed the test of addition, subtraction and division?

A. No; much more than that. There were many other tests besides mere mechanical. That was only a basis of rejection.

(Testimony of Ray H. Northcutt.)

Q. By that do you mean mere bookkeeping errors? A. That is one.

Q. Were there any others?

A. Yes; expenditures made without approval; or expenditures not made, in the vernacular, according to the book. This was to a minor extent but there were instances of non-reimbursible expense for labor and for materials which were the result of oversight in some technical respect, according to the regulations of the War Department, used by their auditors.

Q. Did you not regard that under your contract you were entitled to reimbursement for all labor costs? A. All proper labor costs.

Mr. DeGarmo: I object to this upon the ground that it is covered by a written document here in evidence and that the document speaks for itself as to what is reimbursible and what is not. Counsel is attempting to have this witness say something is reimbursible which the contract says in so many plain words is not. The provision to which counsel is calling [271] attention is prefaced by another section which he has failed to read and which he has assumed to state exists apparently. It states in so many words, "The contractor shall be reimbursed"—(reads)—"approved or satisfied by the Contracting Officer and as are included in the following items."

Then follows the section which Counsel is failing to observe.

The Court: The objection is overruled.

A. (Continuing): All proper labor costs.

(Testimony of Ray H. Northcutt.)

Q. (By Mr. Flood): In the case of employments covered by the Fair Labor Standards Act, they would be just as reimbursible as those that were not, would they not, if they were costs incurred?

A. If they were approved by the Contracting Officer.

Q. As a matter of fact, you have been reimbursed for labor costs which have been held to fall under the scope of the Fair Labor Standards Act, have you not?

A. Not yet, sir.

Q. Have you made claim for some?

A. We are awaiting the outcome of the entire litigation.

Q. As a matter of fact, you are only reimbursible after you have paid the whole account?

A. That is correct. [272]

Q. And you are not reimbursible until you have paid?

A. That is correct.

Q. Do you know whether you have not actually paid some accounts in December of 1946?

A. Yes. We have paid about five or six.

Q. Have you yet made claim for reimbursement?

A. No, sir.

Q. You are entitled to reimbursement, are you not, under your contract?

A. We hope so.

Q. You think you are?

A. Yes.

Q. And you have every reason to believe you are?

A. That is correct.

Q. And you have never had any intimation that payment would be refused?

A. No, sir.

(Testimony of Ray H. Northcutt.)

Q. As a matter of fact, in the conduct of your project, costs incurred under the Fair Labor Standards Act, as far as you are concerned, would be just as reimbursible as any other labor costs, would they not?

A. The same test of contracting officer approval would apply to them.

Q. Showing you the same exhibit, Article V, on page 15, Section 1.b. [273]

A. Yes, sir.

Q. You are familiar and have been throughout the conduct and operation of the project with Article V. Section 1.b?

A. Yes, sir.

Q. And you have recognized your obligation to comply therewith, have you not?

A. Yes, sir; inescapable.

Q. Reading the portion just identified, Article V, Section 1.b.,—"Article V, Special Requirements. 1. The Contractor hereby agrees that he will:

"b. Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances, and other rules of the United States of America. of the State, Territory, or political subdivision thereof, wherein the work is done, or of any other duly constituted public authority."

Mr. Northcutt, will you just tell us what the section of the prime contract which refers to overtime rates is?

A. Not offhand, sir, but I can look for it.

(Testimony of Ray H. Northcutt.)

Q. That Appendix E.

A. Oh, specifically, yes. The specific regulations, Appendix D and Appendix E govern the entire labor provisions for manual and non-manual and were made a part of the prime contract.

Q. You identify Appendix E, subparagraph d?

A. They are not attached to the contract here, are they? I have not found them yet.

Yes, I am sorry. Appendix E, did you say?

Q. Yes. A. Appendix E, yes.

Q. On page 6 thereof, Appendix E?

A. Page 6. Yes, sir.

Q. Then reading E.

The Court: Is this in evidence?

Mr. Flood: Exhibit 13.

The Court: Is it one of the prime contracts?

Mr. Flood: It is the prime contract.

The Court: In respect to which construction projects,—all of them.

Mr. Flood: All of them. I think that was admitted without reservation of objection. I think all of the parties to the prime contract have joined in moving its admission.

The Court: It is now admitted, Plaintiffs' Exhibit 13.

(Plaintiffs' Exhibit 13 received in evidence.)

Q. (By Mr. Flood): Reading from d. on page 6 of Appendix E, Article VIII, subdivision d. "Group B employees [275] will be expected to work any reasonable number of hours during the first six days worked in the regularly established

(Testimony of Ray H. Northcutt.)

work week without payment other than the base compensation. They will be paid at two times the straight time hourly rate for all authorized work performed on the seventh consecutive day the Employee works in any regularly established work week."

Mr. Northcutt, that was included and attached and incorporated as a part of each individual contract of employment with each employee, was it not?

A. Yes, sir; until subsequently modified and then was included as modified.

Q. Was paragraph d ever modified?

A. I believe it was; I am not certain.

Q. In any material particular?

A. I think not.

Q. It is not worth pausing to note here, is it?

A. I don't believe so. I only wanted to make clear that it was changed.

Q. So that from the time you executed that contract, throughout the entire course of the program of the work involved in the Project 202, you conformed to that particular requirement, Appendix E, Article VIII, subdivision d, did you not?

A. Yes, sir. [276]

Q. And there was nothing in 2236 that induced you to modify that paragraph in any way, was there? A. In 2236?

Q. Yes. A. Not that I know of.

Q. Nor in 2390? A. Not that I know of.

Q. Nor in any instruction you ever received

(Testimony of Ray H. Northcutt.)

from the War Department were you ever required to modify in conformity to that paragraph, were you?

A. I believe not. I think the succeeding modifications did not disturb that. However——

Q. You have never deviated from the time the contract was executed from pursuing the requirements of subdivision d, Article VIII, Appendix E?

A. That is correct; as originally written or as amended.

Q. Did Group B employees ever receive payment for any overtime other than double time for the seventh day?

A. No, sir, not during the life of this contract, I believe. Wait a minute. I think either on 7100 contract, or possibly in the early stages of 202 contract, they received straight time overtime.

Q. Over how many hours?

A. On the seventh day.

Q. How much overtime? [277]

A. The original provisions of overtime called for,—there was some straight time overtime called for during our 7100 contract and our 202 contract. I would prefer to say that we paid no overtime except in conformity with the——

Q. Bacon-Davis Act?

A. Well, the Bacon-Davis Act of course applied to manuals, and not non-manuals.

Q. The Labor Stabilization Act, then?

A. Well, we paid no overtime other than in conformity with the overtime provisions of Appendix

(Testimony of Ray H. Northcutt.)

E which we have been talking about of the prime contract or as amended.

Q. In other words, such overtime as you paid on the seventh day which for the most part was double time for the seventh day, was paid pursuant to Appendix E, Article VIII, subdivision d?

A. My only reason for saying that, I don't want to be misquoted as to those paid in one subdivision over another.

Q. I don't want to harass you as to decimal points. I just want to get the over-all picture. We are talking, then, about Group B employees?

A. Yes, sir.

Q. Is there any difference between Group B and Group C employees?

A. Yes, sir. Group C employees received no overtime whatever. [278]

Q. That is the only difference?

A. Yes.

The Court: Was there any other group other than A, B, and C?

The Witness: No, sir.

The Court: What kind of duty did those employees perform?

The Witness: Group C, sir?

The Court: Yes,—generally speaking.

The Witness: Group C were superintendents.

Mr. Flood: If Your Honor will pardon me, with great respect and deference I want to enter an objection to inquiring from this witness what any of these plaintiffs performed because that has

(Testimony of Ray H. Northcutt.)

already been established as a fact by a finding in this court in this case; and the court's finding with respect thereto is the law of this case and this witness could not vary it.

The Court: I have no objection to withdrawing the question and you can disregard it. I can look for that information later. It was merely for my convenience.

Mr. Flood: For convenience sake I have no objection. [279]

The Court: It will be withdrawn.

Q. (By Mr. Flood): Mr. Northcutt, with regard to the scheduled payments called for in the prime contract and incorporated in each of the individual contracts for manual employees, were the payments which were called for in those contracts in conformity with the rates of pay which manuals would have received had they been paid under the Fair Labor Standards Act?

Mr. DeGarmo: May I hear the question?

(Last question repeated by the reporter.)

Mr. DeGarmo: Maybe the witness can answer it. I don't understand it.

The Witness: I don't get the sense of it.

Mr. DeGarmo: I don't think they paid any wages under the Fair Labor Standards Act. I don't think that is what you intended to ask, Mr. Flood.

Mr. Flood: I will ask it again.

Q. (By Mr. Flood): Were the wages received by manuals, employed at Project 202 and in accordance with the prime contract and the included

(Testimony of Ray H. Northcutt.)

subcontracts, in conformity with what manuals would have received or have been entitled to receive under the terms of the Fair Labor Standards Act? [280] A. Not exactly.

Q. Were they for the most part?

A. They were the same as Fair Labor Standards for everything except the seventh day.

Q. They were never less than the Fair Labor Standards? A. That is correct.

Q. And they were in excess of the Fair Labor Standards only because of double time for the seventh day provided for by the Wage Stabilization Act? A. Yes, Executive Order Number 9240.

Q. Under the terms of 9240?

A. I believe so; I think that is correct.

Q. Which was promulgated under the War Powers Act? A. Yes.

Q. So that they never received anything less than they were entitled to under the Fair Labor Standards Act? A. I believe not.

Q. And as to them no problems under the Fair Labor Standards Act arose?

A. That is correct.

Q. Are you familiar with Exhibit 25?

A. May I ask what it is, sir?

Q. A letter dated November 5, 1943, to Guy F. Atkinson Company, Subject: Field Organization Schedule, Adak Depot Project, Alaska Contract, signed George F. Tait. [281]

A. Yes. I haven't its contents memorized but I know what it is.

(Testimony of Ray H. Northcutt.)

Q. What was that with relation to,—not what it contains—but was that a response to some inquiry that originated on your part?

A. Yes. It related to the approval of our submission for approval of the organization and salary schedules.

Q. And that was approval under the terms of the Wage Stabilization Act for all increases in wage rates for original employees?

A. Yes. It was a requirement of the contracting officer that we submit such a schedule without regard to Wage Stabilization as well.

Q. And those schedules had to be approved by an agency of the War Labor Board?

A. No. The submission of this contracting schedule was a requirement of the Contracting Officer. All of this wage stabilization business arose out of that because we were unable to start using classifications and rates which were sufficiently equitable to enable us to man the job.

Q. Under 2236 you did not obtain approval of the War Department Wage Stabilization Agency?

A. Long before that, before 9250 came into effect we had only to submit our salary schedule in conformity [282] with the War Department's regulation for approval. Then any new classification that came up or some circumstance that created an inequity in rate, we could then apply to the Contracting Officer and the Contracting Officer,—we were authorized to place it into effect following the approval of the Contracting Officer. When

(Testimony of Ray H. Northcutt.)

Executive Order 9250 came out, that froze our existing organization and salary schedule entirely. New classifications or changes in the old had to be not only approved by the Contracting Officer but the Contracting Officer was then, according to our understanding, governed by 9250. Hence all of these months of trying to find out the proper authority, which led to the Mechem exhibit here and the Wage Administration Agency of the War Department.

Q. That was the War Department Wage Administration Agency?

A. Yes; that we talked about.

Q. And do you know whether or not that was an agency delegated with the power to pass upon approvals by the War Labor Board?

A. That was our understanding.

The Court: At this point we will take a 10-minute recess.

(Short recess.)

The Court: If counsel are ready, you may now proceed. [283]

Q. (By Mr. Flood): Throughout the life of Contract 202, and 7100, new employees worked for a length of time without any overtime, did they not? A. Group B employees, yes.

Q. And C didn't get any overtime?

A. That is correct.

Q. And Executive Order 9250 had no effect upon them whatsoever, did it?

A. No. 9250 affected base salaries.

(Testimony of Ray H. Northcutt.)

Q. Will you examine Exhibit 21, dated June 28th, 1943, to Guy F. Atkinson Company, signed C. C. Templeton, Major, Corps of Engineers?

A. Yes, sir.

Q. You received that on June 28th, 1943?

A. Evidently June 29th. It is dated June 28th.

Q. You are familiar with it? A. Yes, sir.

Mr. Flood: I should either like the court to read Exhibit 21 or I will read it.

The Court: Is it in evidence.

Mr. Flood: It is in evidence.

The Court: Already admitted?

Mr. Paul: It has been offered by the stipulation [284] but not admitted.

Mr. DeGarmo: It has been offered, if Your Honor please, Exhibit 20 and 21.

Mr. Flood: I join in the offer.

The Court: Exhibit 21 is now admitted. You may read any part of it or all of it now or later.

(Defendants' Exhibit 21 received in evidence.)

Mr. Flood: A letter from Major C. C. Templeton, Corps of Engineers, Chief, Personnel Branch, to Guy F. Atkinson Company, dated June 28th, 1943.

"Gentlemen:

"The following instructions have been received from the office of the Adjutant General, Washington, D. C., by Memorandum No. S5-101-43, dated 4 June 1943, and are quoted for your information and future guidance: '1.a. Problems frequently

(Testimony of Ray H. Northcutt.)

arise under cost-plus-fixed-fee contracts as to the applicability or interpretation of laws or Executive Orders affecting the labor costs of the contractor.

‘b. Such problems have in the main been submitted for determination through the Contracting Officer in the case of private plants operating under cost-plus contracts or through the Commanding Officer of Government-owned, privately-operated plants. However, some [285] contractors have submitted such problems direct to civilian agencies without clearance through the War Department.

‘c. Since the War Department is responsible for the reimbursement of proper labor costs under these contracts, all such problems will be submitted through the Contracting or Commanding Officer. Such procedure should govern problems under Executive Orders Nos. 9240, 9250, and 9301; Fair Labor Standards Act; Walsh-Healey Act; Davis-Bacon Act; Copeland Act; 8-Hour Law; and other laws or orders, past or future, affecting labor costs.

‘2. a. If a ruling is required from a civilian agency it will be obtained by or through the War Department.

‘b. Applications for approval of wage or salary adjustments or other rulings under Executive Order No. 9250 by contractors not included within the delegation of authority from the War Labor Board to the War Department Wage Administration Agency will be submitted to the War Labor Board or to the Bureau of Internal Revenue through the Contracting Officer. The same procedure will be followed with respect to application to the War Man

(Testimony of Ray H. Northcutt.)

Power Commission for interpretations under Executive Order No. 9301. [286]

‘c. With respect to all other laws and orders, necessary rulings of civilian agencies will be obtained by the War Department. Requests for such rulings are to be made through the Contracting or Commanding Officer.

‘3. This procedure is intended to expedite determinations when the War Department has issued governing rulings. In addition, since the War Department must pass upon the labor costs for reimbursement, unnecessary duplication of clearance is avoided.’ ”

Q. (By Mr. Flood): Mr. Northcutt, you never during the progress of the work on Contract 202 or 7100 requested through the War Department a ruling from a civilian agency on whether or not the Fair Labor Standards Act did or did not apply?

A. We never considered it appropriate or necessary.

Q. You would be willing to answer, would you, that you never did request a ruling from a civilian agency,—whether the Fair Labor Standards Act did or did not apply?

A. We never officially——

Q. Can you answer that yes or no?

A. Yes, sir.

Q. Please answer. [287]

A. We did not. I would like to qualify that answer to some extent in order to make it more nearly correct.

(Testimony of Ray H. Northcutt.)

The Court: You may do so.

A. (Continuing): We did not specifically write the War Department and say, "Please get us a ruling from such and such an agency."

At all times when it appeared in our judgment that the existing instructions and orders of the War Department left any question whatever, we referred them to the War Department for clarification as to instructions as has been shown here previously, so I wouldn't say that we never asked the War Department for such instructions. We never specifically, that I know of, made a written request solely for a ruling as such from some agency, although we did just that in referring many of these problems to the War Department for further advice.

Q. I will ask you whether you ever in writing requested a ruling from the War and Hour Division or from the Administrator of the Fair Labor Standards Act with respect to whether or not that Act did or did not apply to the employment under your Contract 202 and 7100?

A. I believe our referral of the Neubert inquiry to the War Department constitutes such an inquiry as you [288] describe, and others of similar character constitute referral of inquiries to the War Department within the meaning of your question.

Q. And the Neubert letter——

A. Neubert's letter of September 9th, 1943, and our reply of September 21st, 1943.

(Testimony of Ray H. Northcutt.)

Q. You have it before you; it is Exhibit 73,—
the Neubert letter? A. Our letter——

The Court: I wish we could identify it by number for the record. What is it?

The Witness: 73 is the letter from Mr. Neubert.

The Court: What is “our reply”?

Mr. Flood: If Your Honor please, may I develop that?

The Court: Just for the record I wish we could get down the numbers of the exhibits.

Q. (By Mr. Flood): Exhibit 73 before you constitutes a letter by Neubert, Branch Manager, Wage and Hour and Public Contracts Divisions, dated September 19th, 1944, does it not?

A. '43, sir.

Q. Is it not 1944? A. I beg your pardon.

The Court: What is the number of the reply to the Neubert letter?

Mr. DeGarmo: Exhibits 76 and 77.

Q. (By Mr. Flood): Is it Exhibit 77, and is it dated September 21st, 1944?—Exhibit 77 in evidence?

A. Exhibit 77, dated September 21st, 1944, is the response to Mr. Neubert. Exhibit 76 is the referral of both the letter and the reply to the War Department.

Q. Exhibit 77 is dated September 21st, 1944, is it not? A. Yes, sir.

Q. That is your reply. And the referral, in 76, is dated? A. September 21st, 1944.

(Testimony of Ray H. Northcutt.)

Q. It is your referral to the District Engineer dated September 21st, 1944? A. Yes, sir.

Mr. Flood: If it has not already been done, I move to admit Exhibits 74, 76, and 77.

The Clerk: Exhibit 74 has been admitted.

The Witness: Exhibit 73, sir.

Mr. Flood: Exhibits 73, 76 and 77.

The Clerk: Exhibit 73 has been admitted, Your Honor,—Plaintiffs'.

The Court: I am advised that Plaintiffs' Exhibit 73 has been admitted. [290]

Mr. Flood: I move to admit Exhibit 76.

Mr. DeGarmo: The only objections, Your Honor, are those set out in the Pre-Trial Order. Well, there is no objection to Exhibits 76 and 77. I think Exhibit 73 has already been admitted over our objection.

The Court: Each of them is now admitted, Defendants' Exhibits 76 and 77.

(Defendants' Exhibits 76 and 77, respectively, received in evidence.)

Q. (By Mr. Flood): Are you familiar with Exhibit 74?

A. 74 is the salary confirmation of Seattle office employees.

Q. Are you familiar with it,—pages 1 and 2?

A. Of Exhibit 74?

Q. Yes. A. Yes, sir.

Q. That is a letter by you, December 3, 1943, to the District Engineer? A. Yes, sir.

(Testimony of Ray H. Northcutt.)

Q. In that letter you called the District Engineer's attention, did you not, to the problem of whether or not premium rates should have been paid for work in excess of 40 hours per week under Contract 7100? [291] A. Yes, sir.

Q. And you likewise called his attention to the very same problem as to whether or not payment of premium rates for work in excess of 40 hours per week was mandatory under Contract 202?

A. Yes, sir.

Q. You also indicated in that letter, did you not, that reimbursement for certain payrolls subsequent to November 1st had been held in abeyance? A. Yes, sir.

Q. By "held in abeyance" that means that you had not received reimbursement, does it not?

A. They were for a short time, in this instance.

Q. Now your letter in December, 1943, received a reply from George F. Tait, Major, Corps of Engineers, Contracting Officer, under date of April 13th, 1944, in accordance with Exhibit 75, did it not? A. Yes, sir.

Mr. Flood: Will the Clerk indicate whether Exhibit 74 has been admitted, Your Honor?

The Clerk: It has been admitted, Your Honor.

The Court: Yes, it has been.

Q. (By Mr. Flood): In reply to your inquiry about premium rates, in that communication you had knowledge from [292] Major Tait that premium rates would only be payable if the Fair Labor Standards Act applied, did you not?

(Testimony of Ray H. Northcutt.)

A. No, sir.

Q. Weren't you able to arrive at that conclusion from the second paragraph at the top of page 2 of that letter?

A. There were other regulations of the War Department which might or might not have required it.

Mr. Flood: I will read the two parts at the top of page 2, of this letter from Major Tait to Guy F. Atkinson Company, on the 13th of April, 1944.

"In answer to the second question, there is no reason why premium rates should have been paid for work in excess of 40 hours per week unless the work came under the jurisdiction of the Fair Labor Standards Act. Many highly trained legal minds have pondered this question without arriving at a satisfactory conclusion. Obviously, the Chief of Engineers did not believe the Fair Labor Standards Act applied because the initial policy was that only straight time overtime be allowed for work in excess of 48 hour per week and then only to the lower grade employees. Grade B employees were allowed no overtime at all during the first six [293] days of the week.

"Circular Letter No. 2391 is a result of this continuous argument about the application of the Fair Labor Standards Act."

Q. (By Mr. Flood): You were aware of the dispute about the Fair Labor Standards Act?

A. Yes, sir.

Mr. Flood: (Continuing reading):

(Testimony of Ray H. Northcutt.)

“The Wage and Hour people claimed that it did apply and no authoritative answer could be obtained, so the legal staff of the Chief of Engineers effected a compromise acceptable to the Wage and Hour people.”

Q. (By Mr. Flood): Were you acquainted with the legal staff of the Chief of Engineers?

A. When he refers to the Chief of Engineers in Washington, I was not acquainted with it at that time.

Mr. Flood (Continues reading): “This provided pay for the lower-bracket employees in conformity with the provisions of the Act.”

Q. (By Mr. Flood): Did you by that reference understand him to mean with regard to manuals? [294] A. No.

Q. What did you understand him to refer to by that phrase?

A. This was all with regard to non-manual employees.

Q. Whom did “lower-bracket employees” refer to?

A. I think unquestionably lower bracket non-manual employees.

Q. Would that be Group A, B, or C?

A. Group A employees probably.

Mr. Flood (Continues reading): “but did not accept the application of the Act over-all, as demonstrated by the straight time overtime provisions of Grade B employees. The only explanation of this is that it was a compromise agreement that such

(Testimony of Ray H. Northcutt.)

employees were semi-supervisory. The Act exempts supervisory employees but nothing is said about semi-supervisory employees, so the debate is still unsettled. The compromise did obtain the assurance that the Wage and Hour people would not press claims under the Act because of failure to pay time and a half overtime for the B group.”

Q. (By Mr. Flood): You have had no difference of opinion with Major Tait over the information he therein set forth? [295]

A. We had no basis for a difference of opinion with Major Tait.

Q. Will you examine Exhibit 39?

A. Yes, sir.

Q. Is that a letter of E. B. Skeel's, Job Manager of the Guy F. Atkinson Company, to the Resident Engineer, United States Army?

A. Yes, sir.

Q. Dated March 18th, 1944? A. Yes, sir.

Q. And Mr. Skeel was located where?

A. At Adak.

Q. Was he an executive of the company?

A. Yes, sir. He was in charge of operations in the field.

Q. Was he an officer, do you know?

A. No, sir, he was not.

Q. Was he having difficulty obtaining and retaining qualified non-manual employees at that time?

A. Well, yes. Let me explain—he was not obtaining——

(Testimony of Ray H. Northcutt.)

Q. First of all, I want to know whether he was and then give the reason why he was.

A. They were obtained for him. The company was having difficulty manning the work under his immediate supervision because of the inequities of the non-manual [296] schedule produced as we have previously described it at great length.

Q. Did you have anything to say?

A. No, I was going to explain this but I will wait until after your question.

Q. With respect to this letter of March 18th, 1944, by Mr. Skeel, were you familiar with the plan that he outlined there, before the letter was written?

A. No. I discussed it on my arrival on an inspection trip at the job before he received his reply, —before the reply was received.

Q. Did you agree with the construction that he put upon the contract there?

A. I agreed that it was not out of line to present that line of argument as a possible relief. We were——

Q. You agreed—to this extent first—that if it were granted it would aid in solving your problem?

A. It would have aided in a measure, yes. Mr. Skeel was not fully aware of the work of assembling and presenting the so-called Abersold,—what eventually became the War Department Wage Administration rulings. And while that was in process of assembly in Seattle, Mr. Skeel employed this means, —and, as a matter of fact, I don't know where the idea actually originated but it originated—— [297]

(Testimony of Ray H. Northcutt.)

Q. You did nothing while you were there to repudiate it?

A. No, I did not. I told him that I thought it would probably not be successful and that we had been three or four months attempting to accomplish the thing through various agencies through the War Department and other agencies, and that we thought that was going to be accomplished before long.

Q. Were you aware of Col. DeLong's reply received by the company on April 5, 1944?

A. Yes, sir.

Q. Exhibit 40?

A. Yes, sir. In fact, I discussed it with Col. DeLong.

Q. You discussed it with Col. DeLong?

A. Col. DeLong, yes.

Mr. Flood: Reading from Exhibit 40, Your Honor, the concluding paragraph——

Mr. DeGarmo: Exhibits 39 and 40 have not previously been offered. I offer them at this time.

Mr. Flood: I join in the offer.

The Court: Is there any objection? Each of them is admitted. Exhibits 39 and 40, Defendants' exhibits.

(Defendants' Exhibits 39 and 40, received in evidence.) [298]

Mr. Flood: "Payment of overtime compensation to Group B non-manual employees would be in violation of Executive Order No. 9240. For the payment of overtime, Government Regulations define Group B employees as follows:

(Testimony of Ray H. Northcutt.)

“ ‘Group B employees will be expected to work any reasonable number of hours six (6) days per week without payment of additional compensation. They will be paid at the rate of two times straight time (the weekly salary divided by 48) for all work which they are required to perform on the seventh consecutive day.’

“This stipulation under Executive Order No. 9240 was made a part of your contract W 45-108-Eng-202 and is contained in paragraph d, Article VIII, thereof. This factor was taken into consideration when the field organization schedule of non-manual employees under Contract W 45-108-Eng-202 was established and approved for your company. Accordingly, this Headquarters cannot approve the request contained in your letter of 18 March. For the Engineer: Very truly yours, L. B. DeLong.”

The Article VIII, paragraph d, referred to is Article VII, paragraph d, Appendix that we discussed [299] earlier, is it not?

A. I believe so.

Q. You testified that you on behalf of the related War Department contractors prepared an exhibit for submission to the War Department Wage Stabilization Agency, yesterday or the day before, didn't you?

A. War Department Wage Administration Agency.

Q. War Department Wage Administration Agency?

(Testimony of Ray H. Northcutt.)

A. As a matter of fact, sir, it was prepared, —well it was later turned over to them. It was prepared in connection with our submission through——

Q. Col. Noble?

A. Through the attorney, Mr. Meechem.

Q. Oh, Mr. Mechem? A. Yes.

Q. Now, your preparation of that submission consumed a lot of time, didn't it? A. Yes, sir.

Q. How long?

A. Well, the submission itself and the working on the uniform schedule that would encompass all of the non-manual classifications, contemplated in the operation of all of the contractors, it went on from the inception of all of the work. West Construction Company, Birch-Morrison-Knudsen, Puget Sound MACCO, and ourselves, [300] and the War Department together with the Personnel Branch, the legal staff and officers had been working on it since the inception of the contract.

Q. The special work which you did, however, was occasioned by the holding of your reimbursement for costs in abeyance, was it not?

A. No, sir.

Q. You are familiar with the so-called "Mechem letter" exhibit? A. Yes.

Q. It is Exhibit 35, dated February 23rd, a letter in which you submitted the problem to an attorney whom you had employed in aiding in preparation of that submission? A. Yes, sir.

Q. At the time you wrote that letter, the Project

(Testimony of Ray H. Northcutt.)

Auditor was holding certain reimbursements in abeyance?

A. No. I testified at great length in connection with that point yesterday. I can repeat it if it is necessary.

Q. Do you agree with this statement in the letter: "The government projects,"—reading now from the bottom of page 2 of the letter—"the government's project auditor is nevertheless withholding reimbursement of all payroll amounts involved." Is that inaccurate? [301]

A. That is. As it turned out, immediately following the writing of the letter they made it clear that they were withholding no payroll amounts, but if, according to the auditors, this was placed in effect prior to approval and in accordance with 9250, they would be withheld.

The Court: What exhibit does that question refer to, Mr. Flood?

Mr. Flood: Exhibit 35.

The Witness: I explained that at more length yesterday, as you will recall.

Q. (By Mr. Flood): And your concern there was to conform to the Wage Stabilization?

A. The Wage Stabilization, yes, and to get our wages at the proper level.

Q. And you prepared a great deal of that submission yourself?

A. A great deal of it was done by War Department employees, some by ourselves and some by employees of other contractors.

(Testimony of Ray H. Northcutt.)

Q. Some time before that letter to Mr. Mechem, which was dated February 23rd, 1944——

A. Yes, sir.

Q. Did you receive a complaint from the War Labor Board [302] about the inaccuracy of your payrolls?

A. We received a complaint from the War Labor Board contending that the application of the salary confirmation constituted a decrease and so was in violation of Wage Stabilization.

Q. Was it about the same time that you received a complaint from the Wage and Hour Division which we discussed earlier in our——

A. No. The Wage and Hour agreement came a few months later.

Q. A few months later?

A. Several months later. To clarify, the War Labor complaint as to salary conversion was in December, 1943, and the Wage and Hour in May, 1944.

Mr. Flood: I have a note here as to a doubt as to whether Exhibit 75 has been offered.

The Court: It has been.

Mr. DeGarmo: In connection with Exhibit 75, if Your Honor please, if Exhibit 74 has not been offered, I wish to offer it at this time in as much as 75 refers to 74 and is unintelligible without it.

The Clerk: It has been admitted, Your Honor.

Mr. DeGarmo: The clerk said it has been admitted.

The Court: It has been admitted. [303]

Mr. DeGarmo: Very well.

(Testimony of Ray H. Northcutt.)

Q. (By Mr. Flood): Asking you to turn to Exhibit 49, a letter from E. H. Rausch, Jr., Major, Corps of Engineers, to Commanding General, Headquarters, Alaskan Department, dated June 15th, 1944,—a copy thereof was received by you, was it?

A. Yes, sir.

Q. And you are familiar with the letter?

A. Yes, sir.

Mr. Flood: I move the admission of Exhibit 49.

Mr. DeGarmo: No objection.

The Court: Defendants' Exhibit 49 is now received.

(Defendants' Exhibit 49 received in evidence.)

Mr. Flood (Reading): "To much emphasis cannot be placed on the fact that we had no authoritative permission to employ any non-manuals at any designation or any rate of pay prior to the rulings obtained from the War Department Wage Administration Agency under date of 27 April 1944. This is true of all contracts awarded after 2 October 1942, whether or not the award was made to contractors who had been engaged on work prior to that date. Supplemental [304] agreements to previous contracts were not affected, however."

Q. (By Mr. Flood): Other than claims that are in litigation, have you ever submitted any claims for labor costs or materials for reimbursement which your company has paid which have not been passed for reimbursement?

Mr. DeGarmo: I submit that questions have al-

(Testimony of Ray H. Northcutt.)

ready been asked concerning that once in this examination, if Your Honor please.

Mr. Flood: I thought I limited my others to Fair Labor Standards Act.

Mr. DeGarmo: No; you asked exactly the same question earlier in the examination.

The Court: Do you recall answering that question?

The Witness: Your question originally, as I understand, was not limited to Fair Labor Standards.

Mr. Flood: Then I don't need to ask it again. I withdraw it.

The Court: You may proceed.

Q. (By Mr. Flood): Contract 202 was entered into on what date? A. September 30th, 1943.

Q. And employment under the project commenced about when? A. About that time.

Q. If you, throughout the course of this contract from the time employment began, had investigated and determined in your judgment—you or your company—that the plaintiffs in this case were entitled to pay under the terms of the Fair Labor Standards Act in accordance therewith, and if the contracting officer or the responsible officers of the War Department had differed with you and advised you that in their judgment the Fair Labor Standards Act did not apply, would you have paid them in accordance with your own determination and judgment or would you have yielded to the War Department?

(Testimony of Ray H. Northcutt.)

Mr. DeGarmo: I object to the question upon the ground that it is a question which assumes a state of fact not actually in existence according to the testimony and asks this witness now to express an opinion upon a state of facts which never did and cannot exist.

The Court: Well, this is cross-examination. The objection is overruled.

A. I don't know, sir.

Mr. Flood: Let's have it read again and, if I don't make it plain, I will try to improve it. [306]

Mr. DeGarmo: I think the witness answered it. He said he didn't know.

A. (Continuing): I hesitate to say what I would have done under exactly those circumstances. Do you mean at that time or knowing what I do now?

Q. (By Mr. Flood): What you would have done at that time and what you would do, considering what you know now?

Mr. DeGarmo: I object to the question, Your Honor.

The Court: The objection is overruled.

Mr. Flood: I think the question is fair and I have adopted his own question.

The Court: He may make answer if he feels he can.

A. I don't even know what the contracting officer would say, in the light of what we know now.

Q. (By Mr. Flood): You have to assume my assumption that I promulgated to you. Assume

(Testimony of Ray H. Northcutt.)

again that you had consulted your attorneys and you had submitted all of the duties performed by these employees to your attorneys and they had advised you and you became convinced and determined that the Fair Labor Standards Act applied, and that you had likewise submitted the same information [307] to the War Department and they took an exactly contrary view and advised you that the Fair Labor Standards Act in their judgment did not apply, would you have followed your own investigation and determination or would you have pursued the advice and instruction—if you wish to so put it—of the War Department?

Mr. DeGarmo: I wish, if your Honor, please, to object to the question upon the ground first, that it is phrased in such a manner as to constitute several questions. In the second place, upon the ground that it assumes a state of facts which did not exist and could not have existed under the evidence in this case.

In amplification of that objection I wish to state this,—that my view of the case is that the thing we are attempting to determine was the state of mind of the defendants at the time that these acts occurred; not what their state of mind may be now or what it might have been at that time if certain facts had not occurred subsequent to that time.

I submit that it is impossible for this witness to divorce from his mind everything that has occurred in the last two or three years and to now express an opinion as to what he would have done

(Testimony of Ray H. Northcutt.)

at that time without his mind being influenced by what has happened [308] since; and the very answer that the witness made originally, here, is conclusive to me of the fact that he cannot do it because that was the question he asked,—“if I know what I know now or knew what I knew then.”

Well, he cannot divorce his mind from what he knows now and put it back in the condition it would have been with what he knew at that time and it cannot be of assistance to the court under any circumstances.

Mr. Flood: I don't think Counsel has a right to ask me or the plaintiff to sandpaper our theory of the case to his views. I conceive, your Honor, that the answer to this question is very material to the ultimate inquiry here. There is nothing metaphysical about it. It is very simple.

The Court: The court feels that if the witness believes that he can answer or at this time make up his mind to that situation and answer, he may now do so. The objection will be overruled.

A. Well, I doubt if I could answer that with certainty. It has since developed that it takes losses to find out whether the Fair Labor Standards Act is applicable or not. The only thing I can say is that if we were convinced that we were actually violating a law, and we would have to assume that the courts had determined [309] that the Fair Labor Standards Act was applicable to the Army's operation in a combat zone in the Aleutians, contrary to the contentions of the War Department at that time

(Testimony of Ray H. Northcutt.)

to us, the only thing that we could have done under our contract was to have—in our then state of mind or now—to be to tell the War Department that we were in violation of a law and that they could not require us to violate a law.

But, as I say, to answer that in that fashion I would say that the circumstances would have to be that the courts would have had to already have determined that it did apply.

Q. (By Mr. Flood): But if you were convinced by whatever criterion was necessary to carry conviction to your mind, you would have applied the law as you were convinced that it was applicable, regardless of what the War Department told you?

Mr. DeGarmo: May I have the same objection to this question, if your Honor please, without repeating it?

The Court: You may have it. Objection overruled.

A. No. I would put it this way: We would not have gone contrary to the War Department's instruction unless [310] it was established with absolute certainty that we would have been violating a law by following the War Department's orders.

The Court: Do you have in your mind the specific reason why? Is there any reason in the contract why?

The Witness: We are required to abide by all laws in the contract. We are also required by the contract to follow the orders of the War Department—

(Testimony of Ray H. Northcutt.)

The Court: Respecting what?

The Witness (Continuing): —through the Contracting Officer with respect to everything; all of our operations under the contract; specifically all labor matters.

Q. (By Br. Flood): There was nothing in the contract which gave the War Department the power to settle and authoritatively decide questions of law, was there; all the contract did—Article V—you are familiar with Article V—was to provide a method whereby, if you differed with the views of the War Department, a method for appeal from the Contracting Officer was provided, wasn't it, and you had merely to submit your request for a decision to the Contracting Officer; isn't that true? [311]

A. Well, we are getting into a discussion here of the contract that—

The Court: I will have to take an adjournment at this time.

Court is adjourned until tomorrow morning at 10:00 o'clock.

(At 4:30 p.m., Wednesday, December 10, 1947, proceedings recessed until 10:00 a.m., December 11th, 1947, in the United States Court House.) [312]

Seattle, Washington

December 11, 1947, 10:00 a.m.

(All parties present as before.)

The Court: You may proceed with the case on trial.

(Testimony of Ray H. Northcutt.)

Mr. DeGarmo: Are the plaintiffs through with their questions?

Mr. Flood: No further questions.

RAY H. NORTHCUTT (Resumed)

Redirect Examination

By Mr. DeGarmo:

Q. Mr. Northcutt, during the year 1942, '43, '44, and '45, was the United States of America engaged in the prosecution of a war? A. Yes, sir.

Q. What if any relationship to the prosecution of such war did Contracts 7100 and 202 have?

Mr. Flood: Your Honor, that is something the court can take judicial notice of and Contracts 7100 and 202 speak for themselves.

Mr. DeGarmo: If your Honor please, I don't [313] believe that that is true. The character of the work which is set forth in the contracts was, by reason of the secrecy thereof, very sparse.

The Court: The objection is overruled.

A. Contracts 7100 and 202 covered the construction of military bases exclusively, for the Army.

Q. (By Mr. De Garmo): Can you state, Mr. Northcutt, as to what use in connection with the prosecution of the war those military establishments were to be put? You can answer that either yes or no, if you can or cannot so state.

Mr. Paul: I object to the question on the ground it is not material or relevant to any issues now before the court.

The Court: Overruled.

(Testimony of Ray H. Northcutt.)

A. Yes.

Q. (By Mr. DeGarmo): What was that use, Mr. Northcutt?

A. Military only.

Q. What was the nature of the military construction itself which was contemplated by the work done under the contract?

Mr. Flood: I make the same objection here that Mr. Paul made to the previous question but also [314] that the contracts speak for themselves and that there is no issue here with relation to the nature or character of the services that were performed in the construction of these projects. That is the issue which was adjudicated in the factual trial of the case when the issues were joined on the facts and a collateral inquiry into that same issue at this time is incompetent, irrelevant and immaterial and outside of the issues.

The Court: My understanding is that it is offered upon the question of good faith.

Mr. DeGarmo: That is correct,—and the state of mind.

Mr. Flood: Then I submit, your Honor, it is a part of the examination in chief and improper redirect.

Mr. DeGarmo: I think not, in view of the questions Counsel asked yesterday as to what his state would have been several years ago had he done so and so and certain things had happened. I have a right to show what the state of mind was at that time.

The Court: Objection overruled.

(Testimony of Ray H. Northcutt.)

The Witness: May I have the question read, please?

(Last question repeated by the reporter.)

A. The nature of the work was housing for military personnel, equipment, armament, shipping, and facilities for the Eleventh Air Force of the Army.

Q. (By Mr. DeGarmo): In connection with that particular phase of the war—that is with respect to what enemy—were these installations prepared? A. Japan.

Q. Mr. Northcutt, what was the character—if you know—of the priority, if any, which was given the procurement or recruitment of labor in the purchasing of materials and supplies for these projects?

Mr. Paul: I object to it on the ground that it is irrelevant. What Counsel is attempting to do here is to show that because of the character—I assume his answer will show that there was a high degree of priority—that therefore any command given by the Army was of the same quality. I do not believe that it has any probative value here. We are now talking about wages,—and because he did something under some other situation about materials has no bearing about wages.

Mr. Flood: My objection, your Honor, is upon the same ground as I made a moment ago. The contract speaks for itself. The contract on its face commands [316] that there shall be no violation of any of the laws of the United States and it is not competent for this witness, in self-serving testimony here, to plead good faith and say “I violated the

(Testimony of Ray H. Northcutt.)

law because there was a war on.” Maybe he did; I don’t know what his reason for it may have been but it is not competent or relevant testimony bearing upon the issue of good faith. The documents speak for themselves. And any statement he may make is not the best evidence of what his duties were. The contracts lay down his duties.

The Court: Is it or is it not the situation, Mr. DeGarmo, that this is offered on the same issue as that testimony previously objected to?

Mr. DeGarmo: That is correct. In other words, the nature of the emergency character of the work and the need for it in the prosecution of the war is something that I think has to be taken into consideration in determining what the frame of these people’s minds were at the time.

Mr. Flood: I object to it as being outside of the issues in this case. Counsel did not give the company under Section 9, because he might have violated an Act for the reason that there was a war or a high priority or any other reason than those specific [317] grounds enumerated, and every other ground is excluded.

The Court: The court has observed in effect if not expressly before this that the issue here of good faith is an issue of fact and it is a question of the state of mind of the defendant.

The objection is overruled.

Mr. Flood: Just for the record, your Honor, I want to clarify my objection by making it plain that the testimony thus offered is incompetent, ir-

(Testimony of Ray H. Northcutt.)

relevant and immaterial because it does not refer to the Act or omission complained of, which alone is the only exclusive ground in the law with respect to which good faith can relate.

The Court: Does anyone else wish to make a statement for the record? Objection overruled.

(Last question repeated by the reporter.)

A. High priorities were given for the procurement of material and the recruitment of labor for the carrying out of this contract.

Q. (By Mr. DeGarmo): Mr. Northcutt, will you refer to Exhibits Number 21, 74, and 75?

A. 21, 74, and 75; yes, sir.

Q. Mr. Northcutt, with respect to these exhibits, which one [318] of those exhibits was received first in point of time? A. Number 21.

Q. Then is it a fact, Mr. Northcutt, that at the time Exhibits 74 and 75 were in the one case sent by your company and the other received by your company, that you had in mind the provisions of Exhibit Number 21? A. Yes, sir.

Q. With reference to Exhibit Number 75, Mr. Northcutt, certain excerpts from the exhibit were read to you yesterday on cross-examination. Will you state what is the fact as to whether—in connection with the performance of your contract—you referred only to portions of a letter received or whether you paid attention to the entire contents?

A. We paid attention to the entire contents.

Q. In view of the provisions, Mr. Northcutt, of Exhibit Number 21, what if any reason did you

(Testimony of Ray H. Northcutt.)

have to believe in April, 1944, when you received Exhibit Number 75, that the applicability of the Fair Labor Standards Act to the work and to the employees who were employed in that work under your contracts had not been determined between the War Department and the Wage and Hour Division? A. We believed and understood—

Mr. Flood: Just a moment, your Honor. [319]

Mr. DeGarmo: The question was “Did you have any reason to believe.” A. Yes, we did.

Q. (By Mr. DeGarmo): What was that?

A. The advice, both written and oral, from the representatives of the War Department that that was the fact. We considered that certainly the War Department, having made those representations to us, was qualified to know and advise us in that regard.

Q. Mr. Northcutt, yesterday reference was made on cross-examination to the matter of non-manual employees in Class B group. I wish to ask you whether the non-manual employees in what would be the Class B group, employed in the Seattle office, were under contract,—that is, written contract.

A. Yes.

Q. What form of contract was that, Mr. Northcutt?

A. It was essentially the same as the others except they provided for a basic 44-hour week at the inception of the job instead of a 48-hour week.

Q. Mr. Northcutt, a hypothetical question was asked you yesterday concerning manual employees

(Testimony of Ray H. Northcutt.)

and the application of the Fair Labor Standards Act to such employees.

I will ask you upon what basis or what laws was the salary or the wages of the manual employees fixed. [320]

A. The Davis-Bacon Act provided a minimum scale below which they could not be paid, and the 8-hour Law established the necessity for overtime over and above eight hours per day. Executive Order 9240 set forth their overtime required for the sixth and seventh day.

Q. Will you refer to Exhibit 13, the prime contract, and to Article X, Section 2?

A. Yes, sir.

Q. What is that particular section headed, Mr. Northcutt? I want to be sure that your particular exhibit is the same as mine.

A. "Article X, Labor."

Q. And Section 2? A. "8-hour Law."

Q. Did that particular section have applicability to manuals or non-manuals or to either?

A. To manuals.

Q. Did it have any application to non-manual employees?

A. I believe so. As generally considered, we thought it applied to manual.

Mr. Flood: I object to "as generally considered." It speaks for itself and if he wants to point out any paragraph in there for the sake of expediency, I do not object to that.

The Witness: I wish to correct that. The [321] 8-hour law applied to manuals.

(Testimony of Ray H. Northcutt.)

Q. (By Mr. DeGarmo): In connection with the fixing of your salaries of the manual employees—the wages of manual employees—what if any consideration was given to the Fair Labor Standards Act by you and your company? A. None.

Q. It was then merely a coincidence that it so turned out that the wages paid were actually equal to or in excess of the provisions of the Fair Labor Standards Act, if that was applicable to those employees?

Mr. Flood: Objected to, your Honor, as pure comment and argument. The facts are before the court and the question is argumentative.

The Court: The objection is sustained.

Q. (By Mr. DeGarmo): Referring to Exhibits 76 and 77, Mr. Northcutt, I call your attention to the fact that in the last sentence of Exhibit 77 the statement is made “We attach a copy of our self-explanatory letter to the District Engineer, Seattle, for your information.”

I ask you what Exhibit it was that accompanied Exhibit 77 as a self-explanatory letter? [322]

A. Exhibit 76.

Q. Then a copy of Exhibit 76 was sent to the United States Department of Labor with your letter of September 21st, 1944, being Exhibit 77?

A. Yes, sir.

Q. Mr. Northcutt, to your knowledge, and during the progress of the work under Contract 202, did the Contracting Officer of the United States War Department ever authorize your company to

(Testimony of Ray H. Northcutt.)

make payment of overtime under the Fair Labor Standards Act? A. No, sir.

Mr. Flood: I object to the question and particularly to the form of the question. It assumes a duty on the part of the Contracting Officer to authorize or direct the contract, naming the obligee and the obligor.

The contract assumption is the matter to which I direct my objection.

Mr. DeGarmo: May I suggest, if your Honor please, that yesterday on cross-examination of this witness Counsel inquired quite at length as to whether, if they had been paid overtime in accordance with the Fair Labor Standards Act, they would have received reimbursement from the United States Government. I think I have a right to show that not only did they [323] not make any payments but no such payments were approved by the Contracting Officer. The contract requires that any payment to be reimbursible must be first approved by the Contracting Officer, as I called your Honor's attention yesterday with reference to the contract, I think it is, Section 2, paragraph 1.

Mr. Flood: Whatever the contract requires itself, your Honor, this witness couldn't vary it.

The Court: The objection is overruled.

A. The answer to the question is no. We were not so ordered or instructed.

Q. (By Mr. DeGarmo): Will you refer, Mr. Northcutt, to Exhibits 63 and 64?

A. Yes, sir.

(Testimony of Ray H. Northcutt.)

Q. Will you state what Exhibit 63 is, if you know, Mr. Northcutt?

A. Yes, sir. Exhibit 63 is a letter from the War Department, Captain D. M. Pelton, Contracting Officer, to Mr. W. R. Morrison, Chairman, Employees' Committee, Guy F. Atkinson Company, dated February 26th, 1945.

Q. Was that letter received by the Guy F. Atkinson Company?

A. Yes, sir; on the 27th of February, 1945.

Mr. DeGarmo: I wish to offer Exhibit 63 in [324] evidence, if your Honor please.

The Witness: That is, a copy of the original was received by Guy F. Atkinson Company.

The Court: Defendants' Exhibit 63 is now admitted.

(Defendants' Exhibit 63 received in evidence.)

Q. (By Mr. De Garmo): Calling your attention next, Mr. Northcutt, to Exhibit 64, will you state what that is if you know.

A. That is a letter signed by W. R. Morrison, Chairman, Employees' Committee, addressed to Guy F. Atkinson Company, dated February 28th, 1945.

Q. And was a copy of this letter or the original of this letter received by Guy F. Atkinson Company?

A. Yes, sir; on March 1, 1945.

Mr. DeGarmo: I wish to move the admission of Exhibit 64.

The Court: Is this letter responsive to the same subject as was mentioned in Exhibit 63?

(Testimony of Ray H. Northcutt.)

Mr. DeGarmo: The same subject matter.

The Witness: Yes, sir.

The Court: Defendants' Exhibit 64 is now admitted. [325]

(Defendants' Exhibit 64 received in evidence.)

Mr. DeGarmo: Exhibit 63, if your Honor please, addressed to Mr. Morrison, Chairman of the Employees' Committee of Guy F. Atkinson Company, signed by D. M. Pelton, Captain, Corps of Engineers, Contracting Officer, dated 26 February 1945.

"Copies of your letter dated 16 February 1945, and the accompanying claims for unpaid wages have been received by the Contracting Officer from Guy F. Atkinson Company. These claims are in the amounts shown for the following employees:"

Then follows a list of five employees with the amounts.

"Analysis of the claims has revealed that the amounts represent wages allegedly due for time in excess of 40 hours during the first six days of a week, computed at 1½ times the basic hourly rate, less any amounts already paid for time in excess of 40 hours.

"After carefully considering the validity of the claims, it is the decision of the Contracting Officer that favorable action is precluded by existing War Department policies. The claims are accordingly denied in their entirety. [326]

"Very truly yours."

Exhibit 64, dated two days subsequent to Exhibit

(Testimony of Ray H. Northcutt.)

63, "February 28, 1945," signed by "W. R. Morrison, Chairman, Employees' Committee" to "Guy F. Atkinson Company" states:

"We have received a reply direct from U. S. Engineers in answer to our letter of 16 February, 1945, attached to which were five claims for unpaid wages, and addressed to Guy F. Atkinson Company.

"The following paragraph is taken therefrom:

" 'After carefully considering the validity of the claims, it is the decision of the Contracting Officer that favorable action is precluded by existing War Department policies. The claims are accordingly denied in their entirety.'

"In view of this statement from the Contracting Officer, it is the intention of the employees of this company to immediately institute such action as is permitted under the Federal Statutes, to have the Civil Courts determine the validity of these claims. Very truly yours." [327]

Q. (By Mr. DeGarmo: In view of this Exhibit 63, Mr. Northcutt, what is the fact as to whether the Guy F. Atkinson Company had submitted to the Contracting Officer for consideration and approval the payment of overtime under the Fair Labor Standards Act?

A. The Guy F. Atkinson Company did submit the claim for the consideration of the War Department.

Q. Mr. Northcutt, will you refer to Exhibit 13, paragraph—I think it is Section 5 (b)?

(Testimony of Ray H. Northcutt.)

A. Article V?

Q. Article V, entitled "Special Requirements"
Section 1 b. A. 1 b?

Q. Yes. A. "Reduced to writing"?

Q. Article V, Section 1 b? A. Oh, yes.

Q. Do you have that? A. Yes, I have that.

Q. That section reads—to read Section 1—"The Contractor hereby agrees that he will"—and Section b.—"Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations, ordinances and other rules of the United States of America, of the State, Territory, or political subdivision thereof wherein the work is done, or of any [328] other duly constituted public authority."

I will ask you what is the fact, Mr. Northcutt, as to whether it was your belief at the time of the performance of your contract 202 that the Fair Labor Standards Act was applicable to your work?

Mr. Flood: Objected to, your Honor, as being incompetent, irrelevant, and immaterial. The rights of these plaintiffs are not at the mercy of any changeable criterion or believe that this witness wishes to adopt. The issue here is what the court will find from the facts and the court cannot be precluded from finding the ultimate issue by the mere expression of internal opinion that this witness cares to assert.

Mr. DeGarmo: I think the ultimate fact does have to be found by your Honor, if the Court please, but I believe yesterday Counsel in his own ques-

(Testimony of Ray H. Northcutt.)

tions indicated a different belief than he is now expressing. He was asking this witness to put himself back three years ago and to guess what he would have done if certain things had happened, which I think is far more removed from the situation than the question I am now asking the witness, as to whether he believed this particular law was applicable or not.

Mr. Flood: I am willing to let yesterday's record stand upon the record made and I do not accept [329] the summation made by Counsel of yesterday's testimony but I stand on my objection right now.

Mr. Graham: May I ask if Counsel considers that the state of mind of the defendants is not material to the matter involved.

The Court: I believe that the court feels it is unnecessary to have that question submitted to Mr. Flood. The objection is overruled. The witness may answer this question.

A. It was our belief that the Fair Labor Standards Act was not applicable to the work under the contract.

Q. (By Mr. De Garmo): Insofar as your views at the time of the performance of the work under Contract 202 are concerned, Mr. Northcutt, what is the fact as to whether you did comply with all of the laws, regulations and so forth described in the paragraph mentioned, which you believe to be applicable?

Mr. Flood: The same objection, your Honor.

The Court: Overruled.

(Testimony of Ray H. Northcutt.)

A. We believe that we complied in every respect to the provisions of the paragraph of the contract referred to.

The Court: Was it paragraph 3?

The Witness: Paragraph b, of Section 1, of [330] Article V.

The Court: Of Section 1, Article V, of which exhibit?

The Witness: Of Exhibit 13. Perhaps I should say Article V, Section 1, paragraph b. of the contract, exhibit 13.

The Court: That is Defendant's Exhibit is it not?

The Clerk: Yes, your Honor.

Q. (By Mr. DeGarmo): Mr. Northcutt, at the time the job descriptions as contained in Exhibit 42 were prepared, what basis did you have for the preparation of such job description?

A. The contribution by the various—

Mr. Paul: I object to the question on the ground that this court has heretofore found what the duties of the claims described in the exhibit are. It is an adjudicated issue, and the question here is attempting to impeach the description of the duties that the court has already found to be the fact.

Mr. Flood: I would like to hear the question if I may, your Honor.

The Court: The reporter will read the question.

(Last question repeated by the reporter.)

Mr. DeGarmo: Your Honor will recall that yesterday there was considerable cross-examination by

(Testimony of Ray H. Northcutt.)

Mr. Flood upon these job descriptions as contained in the submission to the Treasury Department Wage Stabilization Division and also to the Wage Administration Division of the War Department. I am fairly confident that Mr. Flood expects to argue that these job descriptions were not accurate descriptions and were known by these defendants not to be accurate at the time they were prepared and therefore no reliance can be placed upon the approval as shown in the Abersold Directive.

I wish to show the basis upon which these job descriptions were prepared, the information which was obtained and upon which they prepared those descriptions. If Mr. Flood does not wish to make such an argument, then of course I withdraw the question.

Mr. Flood: Before the Court rules, I should like to inquire of the witness whether the information called for in the question was in writing or oral or what type of information he furnished.

The Court: In connection with your answer to the question, will you give that added information?

The Witness: Yes, sir.

The Court: The objection is overruled. [332]

(Last question repeated by the reporter.)

A. The basis for the preparation of the job descriptions — plural — was data already accumulated by the War Department from various sources.

The Court: In what form, if you know.

The Witness: In the form of mimeographed

(Testimony of Ray H. Northcutt.)

bulletins and from compilations prepared by each of the interested cost-plus-a-fixed-fee contractors of the War Department in the Aleutians.

The final submission was compiled in a number of sessions with the War Department representatives and the contractors, management and personnel, into the final submission. The final submission is as accurate as could be, as a uniform compilation, and was made from those written sources plus the discussions of the various people working on them.

Q. (By Mr. DeGarmo): Mr. Northcutt, what if any reason did you have at the time of the preparation of Exhibit 42 and the preparation of the job descriptions as contained therein, to believe that those job descriptions did not accurately reflect the work which was to be done by the individuals indicated in the various job descriptions?

Mr. Flood: Your Honor, that doesn't call for [333] any ultimate facts. It is a purely argumentative question.

The Court: I think it should be conditioned "if any."

Mr. DeGarmo: That is in the first part of the question.

The Court: Overruled.

A. We had no reason to believe that they were not accurate; in fact, we believed that they were.

Q. (By Mr. DeGarmo): Mr. Northcutt, will you refer to Exhibit 79? A. Yes, sir.

Q. I want to make certain, Mr. Northcutt, that

(Testimony of Ray H. Northcutt.)

in the exhibit filed there is, as a part of Exhibit 79, a letter of transmittal. Do you find a letter of transmittal there to the Guy F. Atkinson Company? A. Yes, sir.

Mr. Flood: Your Honor, if counsel wishes, he can examine the witness but to have the record show just what the witness finds or does not find is not competent.

Mr. DeGarmo: I can ask the clerk to bring the record to me and ascertain it for myself if counsel objects to that method. Yesterday, when counsel examined [334] the witness concerning the witness, he did not refer to the letter of transmittal. I want to find out if it is there.

Mr. Flood: Yesterday has now passed into history, your Honor. Let's try each stage of the case as to the present proceeding.

The Court: Avoid comment, if possible.

Mr. DeGarmo: Counsel read yesterday, your Honor, from Exhibit 79 but did not read the covering letter with which it was transmitted to the Guy F. Atkinson Company and which was a part of the exhibit and is therefore in evidence.

The Court: You may read that now.

Mr. Flood: I wish to object, your Honor, to counsel's reference as to what I did yesterday. There wasn't anything reprehensible in anything I wished or to my omitting to read anything. Counsel can read anything that is omitted; that is well understood procedure.

The Court: I think in some ways it is advisable

(Testimony of Ray H. Northcutt.)

to refer to what was done in the way of work before the Court yesterday if in doing so unnecessary comment as to the personal methods or conduct of the one doing it can be avoided.

Counsel now examining may read any part of that [335] exhibit which he wishes to read into the record.

Mr. DeGarmo: The covering letter or transmittal letter of Exhibit 70, dated 15 November, 1945, reads as follows:

“Gentlemen:

“There are enclosed copies of correspondence concerning Fair Labor Standards Act litigation against cost-plus-a-fixed-fee contractors. It is requested that you study the contents thereof in preparation for discussions with this office and prompt compliance of the requirements as outlined.

“Very truly yours,

“J. I. Noble,

“Contracting Officer.”

Miss Krug: One question, please. What was the number of the exhibit from which counsel has been reading?

Mr. Graham: 79.

Miss Krug: Where is the covering letter?

Mr. DeGarmo: You didn't have it. That was the reason I was asking the question.

Miss Krug: I see. Excuse me.

Mr. DeGarmo: I suspected as much and I have

(Testimony of Ray H. Northcutt.)

been called down for it, so let us refer to it no more. [336]

Mr. Flood: May I at this time just take a moment to ask the bailiff to let us see the exhibit?

The Court: Yes, you may.

(Bailiff hands exhibit, which had been marked by the Clerk for the court records, to Mr. Flood.)

Q. (By Mr. DeGarmo): Mr. Northcutt, referring now to this Exhibit 79, and particularly the covering letter, will you state what if anything was done by the Guy F. Atkinson Company with respect to the subject matter of this letter?

Mr. Paul: Your Honor, this is later in time than any claim that I am aware of involved in this litigation; any act or omission complained of by the defendant could not prove claims during November, 1945. I object to it on the ground that it is immaterial and irrelevant and incompetent.

The Court: Did you hear the objection?

Mr. DeGarmo: Yes, I did, if your Honor please. I have checked it and I believe that the last claim which is involved here—if I am correct—is the McNally claim which is the client represented by Mr. Paul. My recollection also is that as to that claim the date of the last claim for recovery is [337] November 10th, 1945. Am I correct, Mr. Paul?

Mr. Paul: I thought it was about the first of September, 1945.

Mr. DeGarmo: Well, will you examine it and

(Testimony of Ray H. Northcutt.)

see if I am correct. I want to know if I am or not

The Court: Let both sides review the Clerk's files. Hand to Mr. Paul the entire Clerk's file in the case.

Mr. Paul: Well, the claim of McNally, according to the exhibit prepared by the company and offered by the plaintiffs, the claim expires October 13th, 1945. He was employed for a few weeks thereafter working overtime.

Mr. DeGarmo: It was my recollection that his employment ceased on September 10th, 1945.

Mr. Paul: His employment may have ceased but he had no claim for employment after this time.

Mr. Flood: On behalf of the Tyler plaintiffs and the Kohl and Sessing plaintiffs, we join in the objection on the ground that the act or omission complained of—

Mr. DeGarmo: I will withdraw the question, if your Honor please, in view of the statement that has been made and the question I asked was immaterial. I withdraw the question and will replace it with [338] another one.

The Court: You may do that.

Q. (By Mr. DeGarmo): Will you examine Exhibit 79, Mr. Northcutt, and refer to that portion thereof entitled "Memorandum of Agreement on Procedures for Handling Fair Labor Standards Act Claims for cost-plus-a-fixed-fee Contractors."

A. Yes, sir.

Q. I wish to ask you when was the first knowledge that you had of the existence of such an agreement?

(Testimony of Ray H. Northcutt.)

A. I believe with the transmittal of this letter.

Q. Did you have any knowledge of any such prior agreement to this one which came with Exhibit 79?

A. No. We may have had some prior instructions other than this; I believe we did, but I think this is the first of this particular instruction.

Q. When I referred to "this" I referred to the portion of Exhibit 79 to which my previous question referred.

A. Yes.

Q. Going back now, Mr. Northcutt, to the year 1942, will you kindly examine Exhibit Number 17?

A. Yes, sir.

Q. Will you state what the exhibit is?

A. It is a letter from the War Department, signed by Captain [339] A. B. Smith, Captain, Corps of Engineers, dated August 27th, 1942, and directed to Guy F. Atkinson Company.

Q. The date of that letter is prior to the 202 contract, is it not?

A. Yes, sir.

Q. Was that letter received by the Guy F. Atkinson Company?

A. Yes, sir; on August 28th, 1942.

Mr. DeGarmo: If it has not already been offered, I wish to offer Exhibit 17 at this time.

Mr. Flood: I want to examine the exhibit, first.

(Mr. Flood examines exhibit.)

May I ask the witness with respect to this exhibit which is dated August 27th, 1942?

The Court: You may do so.

(Testimony of Ray H. Northcutt.)

Voir Dire Examination

Q. (By Mr. Flood): Was that prior to the execution of your Contract 7100?

A. It was about the date, I think, it was about the date, I think, just immediately after the execution of 7100.

Q. Is your Contract 7100 the same pattern as Exhibit 13? [340]

A. Yes, very similar, almost identical, as I recall.

Q. Is it identical with respect to Appendix E?

A. It is similar in that the employment provisions covered by Appendix E, in Contract 202, were also covered by Contract 7100. There were some internal changes in the individual employment contracts which were made a part of Contract 202.

Q. Was the treatment of non-manuals essentially the same in both?

A. Essentially the same, yes.

Mr. Flood: That is not very proper, your Honor, but I simply object on the ground that the contract speaks for itself and that Exhibit 17 or whatever it may have been was later merged in the contract.

Mr. DeGarmo: If your Honor please, the exhibit itself shows that it refers to a contract already executed—7100—so it could not have been incorporated in the contract.

Mr. Flood: Then my objection would not be good, perhaps, as to 7100.

(Testimony of Ray H. Northcutt.)

Mr. Paul: I object to it on the ground that the defendant is attempting to impeach his own exhibit, being Exhibit 14.

The Court: The objection is overruled.

Mr. Paul: May I elaborate on it? [341]

The Court: Excuse me. I thought you had finished.

Mr. Paul: No. Exhibit 14 is 2236 and provides that "Group A employees shall be a 48-hour week."

Mr. DeGarmo: 2236 was promulgated until January, 1943, to my understanding.

Mr. Paul: The issues were determined by your Honor and sustained by the Circuit Court of Appeals to have the 2-year Statute of Limitations which runs to March, 1943.

The witness has testified time and time again that he complied with 2236. Now he is attempting to impeach his own exhibit—being Exhibit 14, and he is attempting to impeach his own statement, given many, many times. I therefore object to it.

Mr. DeGarmo: I attempted to state, and was not permitted to by Counsel's interruption, that the purpose of these exhibits goes to certain matters produced on cross-examination relating to the payment of salaries prior to the effective dates of 2236 and of 2390 particularly—particularly 2390, the Seattle office employees, and this has a direct bearing upon that question which was brought out on cross-examination. We are not attempting to impeach anything. We are attempting to show—

(Testimony of Ray H. Northcutt.)

2236, as your Honor will recall, [342] did not apply to Seattle employees. It applied to Alaska.

The Court: The objection is overruled.

Mr. Graham: May the exhibit be admitted, your Honor?

The Court: Defendants' Exhibit 17 is now admitted.

(Defendants' Exhibit 17 received in evidence.)

Q. (By Mr. DeGarmo): Next, Mr. Northcutt, will you refer to Defendants' Exhibit 18 and state what that is if you know?

A. Yes, sir. Exhibit 18 is a letter from the War Department signed by Captain A. B. Smith, dated September 6, 1942, and addressed to Guy F. Atkinson Company and received by Guy F. Atkinson Company, September 8, 1942, and refers to Exhibit 17.

Q. Exhibit 18 has a reference to Exhibit 17?

A. Yes, sir.

Mr. DeGarmo: I now offer Exhibit 18 in evidence.

The Court: Admitted.

(Defendants' Exhibit 18 received in evidence.) [343]

Mr. DeGarmo: I want to call your Honor's attention that it states as follows:

"The following policy of the Office, Chief of Engineers, in relation to working conditions of

(Testimony of Ray H. Northcutt.)

non-manual employees of all cost-plus-a-fixed-fee contractors is hereby authorized on your Contract No. W-869-Eng-7100.”

Then skipping paragraph a., which has to do with Group A employees.

“b. Group B. Employees whose basic salaries are between \$50 and \$90 per week will be expected to work any reasonable number of hours 5½ days per week without payment of additional compensation. They will be paid straight time (the weekly salary divided by 44) for all work which they are required to perform in excess of 5½ days and on the seventh day.”

That is the end of the quotation of that paragraph. The following paragraph is:

“c. Group C. Employees will be considered key employees and will be expected to work any necessary number of hours (including work on the seventh day), without additional compensation.

“The above policy is mandatory and will be [344] strictly adhered to. Very truly yours, A. B. Smith, Captain, Corps of Engineers, Executive Assistant.”

Q. (By Mr. DeGarmo): I wish to ask you, Mr. Northcutt, what was done by your company with respect to the salaries of the Group B employees and Group C employees, and particularly

(Testimony of Ray H. Northcutt.)

with respect to the payment of overtime after the receipt of Exhibits 17 and 18?

A. They were paid in strict accordance with the directives governing Exhibit 17 and 18.

Q. What is the fact, Mr. Northcutt, as to whether the policy as outlined in Exhibits 17 and 18 was followed by your company until the effective date of Circular Letter 2390 with respect to Seattle office employees?

Mr. Flood: I object, your Honor, upon the ground that Exhibits 17 and 18 antedated the prime contract, Exhibit 13, and merged in the prime contract and, therefore, is incompetent, irrelevant and immaterial.

The Court: Overruled.

A. The provisions of Exhibits 17 and 18 were followed strictly until revised by the subsequent directives.

Q. (By Mr. DeGarmo): Calling your attention to Exhibit 24, will you state whether the provisions of this letter [345] made any change in the provisions of—that is, in the policy as outlined in Exhibits 17 and 18?

Mr. Flood: I object to that, your Honor. Both of the exhibits speak for themselves and this witness can't vary their meaning by his own construction.

Mr. DeGarmo: I withdraw the question.

Q. (By Mr. DeGarmo): Mr. Northcutt, does reference to Exhibit 24 enable you to fix a time

(Testimony of Ray H. Northcutt.)

when the change of policy occurred which you refer to? A. Yes, sir.

Q. What was that date?

A. The effective date of that was November 1, 1943.

Q. Subsequent to November 1, 1943, what was done by your company with respect to the provisions of Exhibit 24?

A. We followed the provisions of Exhibit 24—the directives contained in Exhibit 24—and subsequent clarifying instructions from the War Department.

Mr. DeGarmo: I do not know whether Exhibit 24 has previously been offered. If not, I offer it at this time.

The Court: Defendant's Exhibit 24 is now admitted.

* * * *

[346]

Redirect Examination—(Continuing)

By Mr. DeGarmo:

Q. Mr. Northcutt, in so far as you have knowledge, if you had paid overtime under your contract, contrary to the directions of the Contracting Officer, or of the provisions of the contract itself, and specifically Exhibit E to the contract, what is the fact as to whether you would have been reimbursed for those labor expenditures?

A. We would not have been reimbursed.

Q. What is the fact as to whether you have ever been guaranteed reimbursement by the War

(Testimony of Ray H. Northcutt.)

Department for any expenditures made in connection with Fair Labor Standard Act claims or cases? [386]

Mr. Flood: The question of the indemnification or reimbursement is a matter that specifically is provided for in terms of the contract. This witness' opinion about what the contract means doesn't make the contract. The contract speaks for itself.

Mr. DeGarmo: If that is the position of all plaintiffs, I will be glad to withdraw the question. I rather gathered from some of the cross-examination that was not their position.

Mr. Flood: My position is on behalf of the Tyler plaintiffs.

Mr. DeGarmo: I am referring to certain cross-examination by Mr. Paul.

Mr. Flood: I object to any testimony from this witness about what the contract means. The contract speaks for itself and its construction is a matter of law for the court to determine.

The Court: The court will have to rule possibly one way as to some plaintiffs and possibly another way as to others, if you are going to state a division.

Mr. Graham: If that be so, I believe the record should be clear.

Mr. Paul: May we pause a moment?

The Court: Yes, you may, and consult concerning this matter. [387]

Mr. Paul: I join in the objection, your Honor.

The Court: The objection as to all plaintiffs

(Testimony of Ray H. Northcutt.)

except those represented by Mr. Paul is sustained. The answer may be given now as to the clients represented by Mr. Paul.

Mr. Paul: Your Honor, I don't have any memory as to my cross-examination relating to the promise of identification.

The Court: If you recall it, Mr. DeGarmo, will you please state it now?

Mr. DeGarmo: My recollection of the cross-examination—and I have a note in my notes here that prompted the question which I asked—was that Mr. Paul had asked of this witness if they had paid overtime—I will take that back—if they had been reimbursed for any payments which they had made under the Fair Labor Standards Act cases. In other words, he said “You have paid certain judgments,” and Mr. Northcutt answered he had made certain payments but had not claimed reimbursements from the Federal Government on such payments.

Mr. Paul: I might say, your Honor, that I asked no such questions.

The Court: The objection, so far as the clients [388] represented by Mr. Paul, is overruled. The question may be propounded and the court will consider it with reference to those clients represented by Mr. Paul and only those litigants.

A. We were not guaranteed reimbursement by the War Department.

Q. (By Mr. DeGarmo): You say “we were not.” Does that apply to the present time as well as in the past?

(Testimony of Ray H. Northcutt.)

A. That is correct; we have never been guaranteed reimbursement.

Q. On cross-examination, Mr. Northcutt, reference was made to a deposition which was taken of you at the instance of Mr. Paul, I believe, in certain causes in the United States District Court for the Western District of Washington, Northern Division, being Causes Nos. 1301, 1302, 1479, 1302, and 1585. Mr. Graham calls my attention to the fact that the caption on this is in error and that what is repeated "1302" is repeated twice and that that should be 1487—and Cause Number 1585, on the 17th day of July, 1947.

Referring to the same deposition, Mr. Northcutt, and the same date in the same cases, I wish to ask you if on that occasion—whether you testified with respect to the subject matter upon which you were examined [389] on cross-examination as follows:

“Q. (By Mr. Paul): When was the first contact the company had with agents of the Wage and Hour Division Department of Labor on its Alaskan contracts? “A. About May 1, 1944.

“Q. What took place on May 1, 1944?

“A. On or about May 1, 1944, a young man by the name of Cecil from the Wage and Hour Division—this young chap by the name of Cecil came to our office about the first of May, 1944 from the Wage and Hour Division and wanted to get various information in connection with our contracts; how we ordered and purchased materials, how it was shipped. He wanted to inspect payrolls and payroll computations.

(Testimony of Ray H. Northcutt.)

“Q. Was an inspection made of your wage structure by agents of the Wage and Hour Division at that time?

“A. Yes, by this individual.

“Q. When was the inspection made?

“A. Oh, in the ensuing few days after that. I believe I referred him to the War Department for further information and for corroboration of the fact that all of our procedures were in accordance with the War Department’s instructions, and I believe he called at the War Department office, and in the [390] ensuing some days he made some examinations.

“Q. Did he ever communicate to you what his observations were as to the legality of your wage structure?

“A. He said that according to his understanding and instructions that our overtime—payment of overtime was not in accordance with the rules and regulations under which he operated.

“Q. About what time was that?

“A. Oh, it was a few days after this first contact.

“Q. Did the company act on his statement?

“A. No—yes and no. He asked—he wanted some computations and various—the job that he was doing was doing was too voluminous for him to undertake, he said, and he wanted us to put on a force to do that, and we again in response to that request referred him to the War Department and the War Department told us and, as I understand it, also told him that we were not to do that.

(Testimony of Ray H. Northcutt.)

“Q. Were any meetings held by the personnel of the company and Mr. Cecil at that time?

“A. Our company personnel—he asked if he could interview employees, and I told him that he could interview them, that any action would have to be taken up with the War Department but as far as he was [391] concerned the place was his, and I so instructed our department heads.

“Q. Did the company make any computations of overtime?

“A. No, other than perhaps to show Mr. Cecil how the payrolls were computed and so forth. There was no force assigned in compliance with the War Department’s orders. There was no force assigned.

“Q. Who in the War Department advised the company that they shouldn’t do that?

“A. The contracting officers.

“Q. Which ones?

“A. Major Tait, or Mr. Noble.

“Q. That was during May, 1944?

“A. Yes, I would say, or subsequent. I hesitate to say offhand how much time elapsed during this.

“Q. Did Mr. Cecil make any computations in regard to illegality of overtime—what kind of employees? “A. Non-manual.

“Q. Where were they working?

“A. In Seattle and in Alaska.

“Q. Well, again, what were his observations as to legality under the Fair Labor Standards Act?

“A. In that previous conversation he may have

(Testimony of Ray H. Northcutt.)

inquired about manuals. His observation as to legality was that he didn't know as far as reconciling the [392] difference between the War Department orders and regulations governing us and the Department of Labor instructions, and that would have to be resolved by his office, the Department of Labor, and the War Department, as far as he was concerned. He made no comment as to the conflict between the two departments.

"Q. Did he make any observations as to his opinions of the legality of the wage structure?

"A. No, he did not.

"Q. He just made interviews and made sample computations?

"A. Yes.

"Q. Did he ever express—did he or any other person in the Wage and Hour office express their opinion as to the legality of the overtime to anybody in the company?

"A. Not to my knowledge, no. I am sure not to any of the department heads. I surely would have heard of it. The employees—we kept a hand's off policy on that to assure that the employees would not be embarrassed.

"Q. What do you mean 'hands off policy'?

"A. We told our department heads to assure the employees that this man was apparently to ask any questions that he wanted to know, and that they were to feel free to answer freely. [393]

"Q. Did you receive any correspondence from the Wage and Hour office?

"A. Yes, some months later we received—oh,

(Testimony of Ray H. Northcutt.)

let's see, about four or five months later we had a letter from Mr. Walter T. Neubert, about the middle of September, 1944. We wrote a letter in May in response to Mr. Cecil's verbal requests for certain information relative to the set-up of the contract, how we operated as cost-plus-fixed-fee agents of the government in making purchases when title to all the stuff bought in the contract vested in the government; how the stuff was shipped on Government bill of lading furnished by the government; how we, oh, Contract numbers.

"Q. To whom was that letter addressed?

"A. That was addressed to his office, the Wage and Hour Division of the Department of Labor here in Seattle headed by Mr. Neubert. I believe that letter was addressed to them. That was following his first contact. Then after he made his interviews and stated that as far as he was concerned the matter was in the hands of the Labor Department and the War Department, we didn't see him again, and then we got this letter from Neubert's office, the Wage and Hour office of the Department of [394] Labor in Seattle, about September, 1944, and that we referred to the War Department also.

"Q. Handing you a document designated XVI—3, I will ask you briefly to describe what that is.

"A. That is a letter dated May 4, 1944, from Guy F. Atkinson Company, signed by myself, addressed to the Wage and Hour Division of the United States Department of Labor in Seattle, At-

(Testimony of Ray H. Northcutt.)

tention: Mr. Leonard Cecil, and it supplies information requested previously by Mr. Cecil in connection with his audit or inspection.

“Q. Handing you a letter identified as XVI—4, I will ask you what that is.

“A. This is a copy of a letter dated September 19th, 1944 from Walter T. Neubert, Branch Manager of the Wage and Hour and Public Contracts Division of the United States Department of Labor in Seattle, and it is addressed to Guy F. Atkinson Company.

“Q. Is that a true and correct copy of the original received?

“A. Yes, it is. It is from the files of the Engineer as a matter of fact.

“Q. Handing you a copy of letter designated XVI—5, I will ask you what that is.

“A. That is a letter dated September 21, 1944, from [395] Guy F. Atkinson Company, to the District Engineer, with reference to overtime computation requested by the Department of Labor, and to this letter is attached a copy of the XVI—4 letter. That XVI—5 is a true copy and is also from the files of the Engineer.

“Q. Handing you XVI—6, what is that?

“A. This is a letter dated September 21, 1944, from Guy F. Atkinson Company to the U. S. Department of Labor, Wage and Hour and Public Contracts Division, in Seattle.

“Q. Is that a true and correct copy?

“A. That is a true copy and is in response to

(Testimony of Ray H. Northcutt.)

the XVI—4 letter of September 19, and to this letter XVI—6 was attached a copy of XVI—5 to the District Engineer.

“Q. Handing you XVI—7, I will ask you what that is.

“A. It is an original letter dated October 3, 1944, from J. I. Noble, Contracting Officer of the War Department, to Guy F. Atkinson Company, acknowledging receipt of XVI—6, and containing some further comments.

“Q. Did the Contracting Officer during this period of time advise you that your voluntary payment of additional overtime under the Fair Labor Standards Act [396] would not be reimbursable?

“A. No.”

Mr. Northcutt, that was your testimony at that time fully upon the subject upon which you were cross-examined? A. Yes, sir.

Q. In connection with this letter from Mr. Neubert, Mr. Northcutt, after you referred that to the War Department, what if anything further did you hear from that after the letter from Mr. Neubert, Exhibit 73—what if anything did you hear from the Wage and Hour office subsequent to that time?

A. We heard nothing from the Wage and Hour Department.

Q. Were there any further communications subsequent to that time? A. I believe not.

Q. Mr. Northcutt, in connection with the so-called Abersold letter or directive, Exhibit 16, will

(Testimony of Ray H. Northcutt.)

you state what if any reason you had to believe that the War Department Wage Administration Agency would approve an overtime structure such as was submitted in the Abersold submission, if it in fact violated the Fair Labor Standards Act?

A. We did not have any idea that the Wage Administration [397] Agency would approve it if it was in violation of any law or act or regulation.

The Court: Do you mean you never had any idea that the War Labor Board or the agency operating under it would approve the wage stage directed in the Abersold letter or directive if it had not been approved by the Wage and Hour Division under the Fair Labor Standards Act—is that what you mean to say?

The Witness: Yes, that or any other regulations. We certainly believed that the War Department Wage Administration Agency would not approve of any submission containing anything in violation of any law, act, or regulation, including the Fair Labor Standards Act.

The Court: Mr. Flood, if you wish to move to strike it by reason of your objection, you may make your record.

Mr. Flood: May I hear your Honor's question and the answer?

(Court's question together with the witness' answer repeated by the reporter.)

Mr. Flood: With all deference to your Honor, I do object to the form of the question in that it implies something contrary to anything that has

(Testimony of Ray H. Northcutt.)

been testified [398] to here by any witness that the company had reason to believe that the War Department Agency got the approval of the Wage and Hour branch under the Fair Labor Standards Act.

It includes an assumption which in fact has been denied by this witness, because this witness has testified yesterday that the company never made any inquiry of the Fair Labor Standards Act and they just simply left it entirely up to what the War Department did about it.

To bring the Fair Labor Standards Act into the matter introduced an assumption outside of this case.

The Court: Upon the accuracy of that point—as to whether the assumption develops an inaccuracy as to assumptions of the witness, does anyone wish to develop that point?

The court had this in mind—that yesterday or today someone had given some testimony along that line. But if no one recalls any such testimony, the question and the answer are both stricken and the court will disregard both, thereby sustaining the objection to it.

Q. (By Mr. Graham): Mr. Northcutt, did you have any reason to believe that the War Department registration agency [399] would approve any submission for wage and salary scales and overtime payments which were in violation of any act or regulation of the United States, including the Fair Labor Standards Act?

(Testimony of Ray H. Northcutt.)

A. No, we did not have any belief that the Wage Administration Agency would approve any submission containing a violation—as you recount—and we specifically instructed—

Mr. Flood: The rest of the answer is volunteered and unresponsive. There is no question eliciting it. I object, your Honor.

The Court: The answer may be discontinued and you may ask another question if you think there is anything else to be inquired about.

Mr. Graham: No further questions.

Mr. DeGarmo: That completes the redirect, if your Honor please.

The Court: Is there any recross examination?

Mr. Flood: I have a few questions but I think I should defer to Mr. Paul.

Recross Examination

By Mr. Paul:

Q. Mr. Northcutt, when I took your deposition dated July 17th, 1947, in Wood versus Guy F. Atkinson Company, [400] pending in the United States District Court, Northern Division, did I not ask you then and did you not respond,

“Q. Handing you Roman numeral XVI—
7, I will ask you what that is?”
and you answered:

“It is an original letter dated October 3, 1944, from J. I. Noble, Contracting Officer of the War Department, to Guy F. Atkinson Company, acknowledging receipt of XVI—6, and containing some further comments.”

(Testimony of Ray H. Northcutt.)

And did I not ask you,

“Did the Contracting Officer during this period of time advise you that your voluntary payment of additional overtime under the Fair Labor Standards Act would not be reimbursible?”

And did you not then answer, “No.” Is that true?

A. I want to make sure that I have the negatives properly—

Mr. Graham: May I ask the reporter to read the portion of the deposition which was read in the question?

(Last question repeated by the reporter.)

The Witness: The question is: The question asked in the deposition — “Did the Contracting [401] Officer advise us that payments made—”.

Mr. Paul: Voluntary payments of additional overtime under the Fair Labor Standards Act would not be reimbursible.

Mr. Graham: To which your answer was “no.”

A. Was my answer “no” at that time? I think that is correct—that he did not tell us that they would not be reimbursible.

The Court: May I ask counsel, all of those at the counsel table, if the deposition which Mr. Paul is now referring to is the same deposition which Mr. DeGarmo a few minutes ago referred to?

Mr. Paul: Yes, your Honor.

Mr. Graham: Yes, your Honor.

The Court: Proceed.

Q. (By Mr. Paul): In my deposition were the

(Testimony of Ray H. Northcutt.)

following questions and answers made and given respectively:

“Q. Why did not the company pay overtime in accordance with the request of the—

“A. (Interposing): There was no demand made on us to pay it in the first place, and, in the second place, the War Department instructed us to have nothing to do with it. [402]

“Q. Did you feel bound by the War Department instruction?

“A. Yes. There was no demand made on us to pay anything, by either the employees or the Wage and Hour Division.

“Q. Other than the letter of September 19—

“A. Asking for a computation. It never did ask us to pay anything.”

The Court: May I ask Counsel: Was that the Neubert letter?

Mr. Paul: Yes, your Honor. The letter of September 19th.

Mr. Paul (Reading): “Q. The letter of September advised you, did it not, that—

“A. (Interposing): That we were in violation.

“Q. What, if anything, did you do to correct the violation?

“A. We called upon the War Department to give us any instructions concerning the matter and were advised by the War Department that they would take it up with the Department of Labor and we were to have nothing to do with it, and if any further calls were made upon us to refer them

(Testimony of Ray H. Northcutt.)

to the War [403] Department, but no further calls were made upon us by the Department of Labor.

“Q. You were aware, were you not, that employees could ask your firm directly for wages under the Fair Labor Standards Act?

“A. Not at that time, no. I have subsequently learned of that.

“Q. When did you learn of that?

“A. Oh, about the end of 1944 or early 1945, I guess, somewhere along in there.

“Q. What were the circumstances of your learning of that?

“A. There were some claims filed.

“Q. By whom?

“A. By various employees in the Seattle office.

“Q. Were those claims later incorporated in the Lassiter case?

“A. I believe they were.

“Q. What, if any, steps did you take at the time the claims were filed with your company to protect your company from an adverse judgment?

“A. You mean subsequently—when these claims were filed?

“Q. Yes.

“A. We referred them to the War Department for instructions. [404]

“Q. Did you do anything else?

“A. No, except wait for War Department instructions.

“Q. Have you ever received an opinion as to whether or not a judgment against your firm would

(Testimony of Ray H. Northcutt.)

be reimbursible, the judgment being based upon claims under the Fair Labor Standards Act?

“A. Yes, we have.

“Q. When did you receive that?

“A. Oh—I don’t remember.

“Q. Were they oral or written?

“A. Well, I believe the opinions were oral, but there is—there are written instructions from the War Department instructing us to deny all claims under the Fair Labor Standards Act, and to report them to the War Department, and we were advised that the War Department would defend it either through the U. S. Attorney’s office or through private counsel.

“Q. What was the date of these instructions?

“A. You mean instructions from the War Department advising us to deny all claims under the Fair Labor Standards Act?

“Q. Yes.

“A. Oh, I would say late 1944, or early and running into 1945. [405]

“Q. Who were they written by?

“A. The then Contracting Officer of the War Department.

“Q. Would that be Noble?

“A. Noble or Tait, or Captain Pelton.

“Q. Were there oral instructions during that period?

“A. Yes, some oral discussions to the same effect.

“Q. Were there any oral conversations between

(Testimony of Ray H. Northcutt.)

your company and the Contracting Officer during the latter part of September, 1944 when you received this letter from Neubert?

“A. Yes, I think they are more or less confirmed in the correspondence. There were probably—there were some verbal discussions just prior to the receipt of the letters and they were in the general nature of the letters.

“Q. Now, when was the opinion expressed by the War Department that judgments under the Fair Labor Standards Act would be reimbursible?

“A. I don’t recall. I would say that that was probably after the filing of the Morrison and Lassiter cases before they became—some time after they were filed as claims and referred to the War Department and denied by the War Department and some time subsequent to that which would place it—oh, I would say some time in 1945, I guess. [406]

“Q. Early in 1945—January, February?

“A. It could have been late in 1944, I suppose, possibly, I simply don’t recall.

“Q. Did the company do anything else besides report to the War Department of the demand by the Wage and Hour office?

“A. Not that I recall now.

“Q. Was the company worried that—

“Mr. Graham (Interposing): I object to the form of the question, Fred, ‘Was the company worried?’

“Q. (By Mr. Paul): Did the company make any attempt to change its wage structure when

(Testimony of Ray H. Northcutt.)

Neubert's letter of September 19th, 1944, was written?

"A. You mean this Seattle office conversation?

"Q. No, the document identified XVI—4, dated September 19, 1944.

"A. That is the letter from Neubert's office?

"Q. Yes.

"A. Well, that had to do with the salary conversion that the War Department had ordered earlier, and we made—we took no action other than to continue to follow the War Department's prescribed procedure in that regard." [407]

Were those questions asked you and those answers made? A. Yes, sir.

Q. Will you refer to Circular Letter 2390 which is Exhibit 15, and point out to me in the entire exhibit where Circular Letter 2390 authorizes or directs anyone to provide for wages being paid on a 44-hour per week basis by using the divisor 46?

A. Can I do what?

The Court: Point out any place therein. I believe that is what was meant. I believe you left out "any place."

Mr. DeGarmo: I object to the question upon the ground that it is entirely incompetent, irrelevant and immaterial. I don't recall in the testimony that anyone ever divided it by 46.

The Court: You may answer the question.

A. There is no place in Circular Letter 2390 where any such formula is set forth that I know of.

Q. (By Mr. Paul): Prior to November 1, 1943,

(Testimony of Ray H. Northcutt.)

your Group A and Group B employees in Seattle were being paid on a 44-hour week, were they not?

A. Yes, sir.

Q. Subsequent to November 1, 1943 you paid your employees, [408] you have testified, in accordance with 2390? A. Yes, sir.

Q. Your Seattle office employees?

A. Yes; in accordance with 2390 and directives from the War Department.

Q. Does Circular Letter 2390 relate to any other non-manual employees except those in the Seattle office? A. No, sir.

Q. Calling your attention to Exhibit 75, do you find a reference on page 2 referring to Circular Letter 2390?

Mr. Graham: If your Honor please, I would like to suggest that Counsel is doing exactly a repetition of what was done on cross-examination. The precise exhibit was examined on cross-examination proper and was made the subject of a number of inquiries and attention was directed to this specific paragraph and inquiries made here. It just seems that we are repeating matters that were covered previously.

The Court: Is that not true, Mr. Paul? What is your reaction to that?

Mr. Paul: Your Honor, I am interested in a short record. I had not thought that it was fully developed.

The Court: Be as brief as possible. Can't you narrow the inquiry by more exact form of ques-

(Testimony of Ray H. Northcutt.)

tions [409] so that if there is some particular point that needs further clarification you can get that without going too far afield?

Mr. Paul: I withdraw that question your Honor.

The Court: Mr. Paul, have you any concern about any plaintiffs' exhibits which you would like to have cleared respecting admission in advance, or are you leaving that to others? at any rate other counsel—

Mr. Paul: I think that all that have been identified are in.

The Court: Do other counsel have any questions on recross examination?

Mr. Flood: I am anxious, your Honor, that we do not overlook admission of any plaintiffs' exhibits, and if there are any that have not been admitted, I now move for their admission.

Mr. DeGarmo: The record, I think, indicates that plaintiffs' exhibits 61, 69, 71 and 72 have not been admitted—73 has.

Mr. Flood: I am advised that those are exhibits which may only become material upon a part of our case and we haven't reached that stage, yet, so I withdraw the request that they be admitted. [410]

The Court: Is there nothing further?

Mr. Flood: I would like to ask a few questions of the witness.

The Court: You may do that.

By Mr. Flood:

Q. You received a copy of Exhibit 79?

(Testimony of Ray H. Northcutt.)

A. Yes, sir.

Q. As of about the date of transmittal?

A. Yes, sir.

Q. October 3, 1944? A. Exhibit 79?

Q. Yes—or what date was it then?

A. The 15th of November, 1945.

Q. You familiarized yourself with it?

A. Yes, sir—subsequent to its receipt.

Q. Did the War Department furnish you copies of its bulletins on the subject matter of your war contracts from time to time? A. Yes, sir.

Q. Was it their practice to furnish you all bulletins which dealt with your contracts?

A. No, sir.

Q. Which ones was it their practice not to furnish you?

A. Well, they maintained in their files, in their offices, [411] in the Textile Tower, and in their auditor's and Contracting Officers' offices, adjacent to ours in the O'Shea Building, volumes in reference to bulletins, some of which were transferred directly to us or delivered directly to us and some of which were simply held in their offices.

Q. Did you go into their office to consult them or to consult the bulletins which they maintained there?

A. Yes, from time to time—some of them.

Q. Those that were pertinent or germane to your contract were always available to you?

A. That is correct.

Q. Did you make it your effort to familiarize

(Testimony of Ray H. Northcutt.)

yourself with their procedure as outlined in bulletins that affected the operation of your contract?

A. Those pertinent to the current problems, yes, sir.

Q. Were they on the same floor that your company's offices were on in the O'Shea Building?

A. Some of the Contracting Officers were on the same floor, and their auditing staff were at one time on the same floor and at another time on other floors in the same building.

Q. Did you familiarize yourself with procurement regulation Number 9, issued by the War Department on March 21, 1944? [412]

A. I could not say. We referred to procurement regulations that their auditors had. I do not recall the numbers of them or the dates of them.

Q. Would you remember Procurement Regulation Number 11?

A. Not by number. I might by the subject matter, and I might not.

Mr. Flood: I ask that the Procurement Regulation Number 9 be submitted to the witness and ask him to read it and see whether he—

Mr. Graham: I ask, for the record, that a firm identification of the same be made.

The Court: Has it been marked for identification by the Clerk?

Mr. Flood: It has not been.

The Court: Let the document referred to be marked with a plaintiffs' exhibit number. Let this be marked Plaintiffs' Exhibit Number 81.

(Testimony of Ray H. Northcutt.)

(Federal Register-Procurement Regulations 9 and 11, marked Plaintiffs' Exhibit Number 81 for identification.)

Q. (By Mr. Flood): Did you note Procurement Regulation 9 there?

A. Procurement Regulation 9, yes, Exhibit 81.

Q. Will you examine that, or so much of it as is necessary to determine whether you have ever been familiar with [413] it?

A. I have at one time or another, I think, read most of the contents of this same language.

Q. Will you turn over a few pages further to Regulation Number 11 and tell me the same thing about that?

A. Regulation 11? I don't know whether this is the same memorandum of agreement that is referred to in one of these exhibits and was forwarded to us or not. It appears that it may have been.

Q. It was my opinion that it did refer to exactly the same thing, but I wanted to have you tell me whether it did or not.

A. It has some of the same headings apparently.

Q. Is the subject matter just about the same as far as you can tell?

A. I couldn't tell without some comparative reading. I say it appears to be about the same form.

Mr. Flood: I offer Exhibit Number 81 as being Procurement Bulletin Number 9 and Bulletin Number 11 as identified by the witness.

(Testimony of Ray H. Northcutt.)

Q. (By Mr. Flood): For the record, what pages are they there, Mr. Northcutt?

A. It starts—Procurement Regulation Number 9 start on page 2988. And 11 starts on page 2992 of the [414] Federal Register of March 21, 1944.

The Court: Does the Federal Register have a volume number?

The Witness: Volume 9, Number 57, Tuesday, March 21, 1944.

Mr. Flood: I move the admission—

Mr. DeGarmo: There is just one question I would like to ask on voir dire, if I might, if your Honor please.

The Court: You may do so.

Voir Dire Examination

Q. Mr. Northcutt, are you able to place or fix the time when these two procurement regulations Number 9 and Number 11 came to your attention?

A. No, sir.

The Court: Plaintiffs' Exhibit Number 81 is now admitted.

(Plaintiffs' Exhibit 81 received in evidence.)

Q. (By Mr. Flood): It was your practice, was it not, to familiarize yourself with the referable and applicable bulletins as they were promulgated and received; you [415] didn't lose any time in familiarizing yourself with the problems that you had to deal with, did you?

A. To a certain extent, possibly, yes. No one could have read all of the bulletins that were there. The function of the War Department's auditors

(Testimony of Ray H. Northcutt.)

was to keep posted on those matters, and the staffs and personnel of the CPFF contractors were necessarily reliant upon the War Department's auditors to maintain and advise us of all of these bulletins.

Q. As Vice-President of the company, you tried to keep informed and abreast of everything that was important to the operation of your project, did you not?

A. Yes—in so far as practical and possible.

Q. The conditions under which the Fair Labor Standards Act might or might not apply was a matter of great importance to you?

A. If it did apply.

Q. Yes—whether it did or did not apply. And the extent to which labor claims were reimbursible to you was a matter of some considerable importance to you, wasn't it?

A. Yes, sir.

Q. In your testimony you have spoken about field schedules—am I correct about that?

A. The heading of some of these letters referred to field [416] organizational schedules.

Q. What do you have in mind; what is a field organization schedule?

A. Well, a schedule of the organization in the construction in the theatre of operations as contrasted with the organization schedule for the Seattle headquarters offices.

Q. These schedules also carried with them a description of the job and the schedule of payments, did they not?

A. Salary ranges.

Q. Let's turn to Exhibit 52 for a moment. Do

(Testimony of Ray H. Northcutt.)

you have it before you? A. Yes, sir.

Q. It relates, does it not, specifically in paragraph 2 thereof to salary schedule set forth in Appendix C of the prime contract 202—

A. Yes, sir.

Q. —which is Exhibit 13; and turning to the next to the last page marked—it is not numbered—but marked Appendix C there is set forth a description of the positions and the amount of the salary, is there not, the salary ranges?

A. Yes.

Q. Those are the executive officers of the company that are dealt with there, aren't they? [417]

A. Yes. Appendix C is a special listing of key employees supposed to be listed at the time the contract is entered into.

Q. By the way, you are identified there as Project Manager, are you not? A. Yes, sir.

Q. And that was attached to and was a part of prime contract, Exhibit 13 when it was executed?

A. Yes, sir.

Q. So that the function of Exhibit 52 was to approve salary increases for yourself and the other main key officials designated therein, was it not?

A. Not exactly, no.

Q. Well, that was the result of it, was it not?

A. No, not exactly. If you wish me to explain, I can do so.

Q. All right; go ahead. You can probably explain better than I can.

A. Appendix C was required on all of these con-

(Testimony of Ray H. Northcutt.)

tracts to indicate to the War Department the identity and the position to be filled and the maximum salary expected to be paid or agreed to be paid under the contract to those individuals as contemplated at the time the contract was entered into.

In this instance, at the time that this contract [418] was entered into, these key individuals were in the same position in many respects as other non-manual employees in the organization and schedule generally that has been referred to in other exhibits here, in the belief and understanding that we could not exceed the salaries frozen by Executive Order 9250 on the original contract — smaller contract 7100 and the shorter working hours—

Q. That belief of yours was derived from Article 21(h) of the contract, was it not; as a matter of fact, it said you could not do so.

A. Oh, it was derived from various sources, Executive Order 9250 and the instructions—

Q. Didn't your contract obligate you, under Article II, Section 1, not to make any such increases except—

A. Perhaps it did.

Mr. Graham: So that the record may be clear, may we have Counsel's reference to the contract again, your Honor?

Mr. Flood: Article II, Section 1(h).

The Witness: I don't recall what that is but for my explanation it is not necessary, as I see it.

Q. (By Mr. Flood): Go ahead.

A. With the approval obtained—the approved

(Testimony of Ray H. Northcutt.)

ruling of [419] the Wage Administration Agency of the War Department—we were then authorized to pay the salaries approved in the Wage Administration ruling. Appendix C of the contract, however, still carried the maximum listing under this Appendix C of the old 7100 contract. It was therefore necessary for the War Department to authorize the substitution or the revision of this Appendix C which is in the second sheet, here.

The Court: We will have a 10-minute recess.

(Recess.)

Q. (By Mr. Flood): Mr. Northcutt, referring to Exhibit 52, as Col. Wild stated in his letter, the last paragraph thereof — the second page, paragraph numbered “4”—in order for you to render the increases of salaries reimbursible under the contract, Article XXI(h), it was necessary to modify the original Appendix C to the contract in accordance with the Appendix C revised, submitted to you, was it not?

A. Yes, sir.

Q. So that in order to increase the salary of Nord, Business Manager, from \$125 a week to \$173 a week, and to make that reimbursible, the original Appendix C had to be modified to read “In accordance with Appendix C revised”? [420]

A. To more correctly state it—in order to set up a new maximum which we could not exceed. We couldn’t change any without the approval of the Contracting Officer.

Q. And if you paid any amount in excess over the amounts stipulated in the original Appendix

(Testimony of Ray H. Northcutt.)

C without getting the contract modified and the approval of the Contracting Officer, it would not be reimbursible, would it? A. Yes, sir.

Q. Therefore, that was the reason why Col. Wild asked you in paragraph 4 for authority to modify the contract in accordance with Appendix C revised which he proposed?

A. He didn't ask us for that authority, sir. That was to the War Department Wage Administration Agency for authority to modify that contract.

Q. That is right.

Did you ever agree in writing to the modification as contained in Appendix C Revised.

A. Yes. The modification was drafted by the War Department as submitted for our signature, then for the War Department's special approval.

Q. Did you subscribe to it by putting your signature to it? A. Yes, sir.

Q. When was it, if you know—if you don't know, it was somewhere about this time? [421]

A. Yes, sir.

Q. Are you familiar with Exhibit 17?

A. Yes, sir.

Q. There is nothing in Exhibit 17, is there, Mr. Northcutt, which relates to a formula for payment of overtime for non-manuals?

A. Yes, it does, in paragraphs A. B. and C; that is, Group C, of course, get no overtime. The formula for overtime is set forth in Group A and Group B.

(Testimony of Ray H. Northcutt.)

Q. Do Group B get overtime?

A. Yes, on the seventh day—in excess of five and a half days and on the seventh day.

Q. I didn't have the seventh day in mind. Except for the seventh day, there is nothing in Exhibit 17 relating to the payment of overtime, is there?

A. And in excess of five and one-half days.

Q. Did you ever pay overtime to any Group B employees except for the seventh day?

Mr. Graham: Where employed?

Q. (By Mr. Flood, continuing): In Seattle or the Aleutians, either one?

A. I, at the moment, don't recall whether we paid Group B for overtime in excess of the five and one-half days or not, under this— [422]

Q. Does not paragraph b specifically say they will be paid straight time?

A. "For any reasonable number of hours five and one-half days a week without payment of additional compensation."

They had been paid straight time, the weekly salary divided by 44 for all work which they are required to perform in excess of five and one-half days and on the seventh day.

Q. So you did not pay them time and a half for any work they performed in excess of five and one-half days, did you?

Mr. Graham: If your Honor please, I object to the line of inquiry here. I don't believe that that question is material whatsoever to this inquiry.

(Testimony of Ray H. Northcutt.)

The amount of overtime compensation which the plaintiffs were entitled to under the Fair Labor Standards Act prior to the Portal Act has been gone into in this case under the merits. We are concerned here with the issues under the Portal to Portal Act. I confess I don't see any materiality under this inquiry.

The Court: Overruled.

Q. (By Mr. Flood): Exhibit 17 did not relate to the payment under any formula under the Fair Labor Standards Act, did it? [423]

A. Evidently not.

Q. And that is true of all the exhibits relating to the Abersold Directive, is it not?

A. In so far as they applied to Group B employees—

Q. And C?

A. —the Wage Administration Agency approvals covered no overtime except for the seventh day for Group B employees.

Q. And there wasn't anything in the Abersold Directive attempting to deal with payments under the Fair Labor Standards Act, was there?

A. I don't know.

Q. You are not aware of anything in there that does?

A. We were assured by the War Department that—

Q. Just tell me whether you are or are not aware of anything in the Abersold agreement which relates to pay under the Fair Labor Standards Act.

(Testimony of Ray H. Northcutt.)

Mr. DeGarmo: I object to Counsel asking the witness which requires him to construe the Fair Labor Standards Act and at the same time objecting.

Mr. Graham: I would like to make the further objection again to this line of inquiry. If Counsel is seeking to establish that the payments to these claimants were not made in what this court has heretofore construed to be in violation of the Fair Labor [424] Standards Act and prior to the Portal to Portal Act, that is not in issue before this court now.

The Court: The objection is overruled. If counsel for the defendants feel that the answer of the witness does not cover the matter, they may redirect his attention by further proper question.

A. I am unable to answer yes or no as I understand it.

Q. (By Mr. Flood): Please tell me if there is anything in the Abersold Directive, as you term it, relating to the payment of overtime under the Fair Labor Standards Act?

Mr. DeGarmo: I again wish to object to the question upon the ground that it asks this witness to give his construction of the document, without including in that question the question of whether he understood there was anything or understands there is anything in the document.

Mr. Flood: Thank you, Counsel. I meant to do that and I overlooked it.

Mr. DeGarmo: If you put that in the question,

(Testimony of Ray H. Northcutt.)

then I certainly have no objection to the question, but attempting to get a legal conclusion is something else. [425]

Q. (By Mr. Flood): Is there anything in the Abersold Directive which you understood to relate to the payment of overtime rates as prescribed by the Fair Labor Standards Act?

A. No, I believe not.

Q. The same thing would be true, would it not, to Exhibit 14, being 2236? A. Yes, sir.

Q. And the same would be true of 2390?

A. I suppose so.

Q. You spoke of taking the initiative in preparing an exhibit I believe—preparing a general submission to the War Department Wage Administration Agency for approval of wage and salary structures on behalf of all of the cost-plus-fixed-fee contractors in Alaska—taking some considerable time in doing so. In connection with that were the job classifications named in your submission classifications that were common to all of the contractors?

A. Yes, sir; that was the attempt—to make a uniform coverage.

Q. Uniform? A. Yes, sir.

Q. The description of the classifications was identical with respect to all of the contractors? [426]

A. Yes, sir; all contractors did not use all of the classifications in the uniform descriptions, but the intent was to provide complete coverage.

Q. As a result of the directions communicated

(Testimony of Ray H. Northcutt.)

to you in any and all of the exhibits admitted in evidence from Exhibit 14 down to and including Exhibit 79, there was never anything that induced you to modify or change the wage structure laid down in Appendix E to the prime contract, was there?

A. The wage structure was not laid down in Appendix E. Those are only the employment conditions and overtime provisions.

Q. There was nothing about wages in Appendix E? A. No, sir.

Q. There was nothing in any of the exhibits, Exhibits 14 to 79, inclusive, admitted into evidence that induced you to change the requirements in Appendix E with respect to payment of overtime,— appendix E relating to Group B and C non-manuals?

Mr. Graham: May I have the question read?

(Last question repeated by the reporter.)

Mr. Graham: If your Honor please, I don't understand the question. It may be intelligible to the witness. Also the fact it covers some 70 [427] to 80 witnesses, the cross-examination question is not pointed enough to be helpful.

Q. (By Mr. Flood): You are familiar with all of the exhibits which were admitted here yesterday and today, aren't you?

A. Yes, about as familiar as I ever will be, I think.

Q. And there was nothing in any of those exhibits which resulted in your deviating from the

(Testimony of Ray H. Northcutt.)

payments under Appendix E relating to overtime—

A. I am sure that I—

Q. I mean non-manuals, of course.

A. Yes, I understand. The specific provisions of Appendix E, as they apply to overtime for Groups B and C?

Q. Non-manuals, B and C?

A. Not in the actual wages paid or gross earnings but the—

Q. The formula with respect to the payment or non-payment of overtime?

A. By formula do you mean the regulation that Group B received no overtime a reasonable number of hours per day?

Q. I had hoped to avoid having to turn to the contract. I am speaking now about prime contract, Exhibit 13, [428] Article 8, subdivision d, Appendix E. There is nothing in any of the exhibits that you described yesterday or today or during your testimony on the stand that resulted in your deviating from the provisions of the contract as I have just identified it, paragraph d, with respect to working any reasonable number of hours during the first six months worked in a regularly established work week without payment other than the base compensation? A. I think that is correct.

Mr. Flood. That is all, your Honor.

The Court: Anything further on redirect?

Mr. Graham: Yes, your Honor.

I would like to ask your Honor's permission to ask the witness about two questions on redirect examination.

(Testimony of Ray H. Northcutt.)

The Court: It will give the right to recross examine to the extent that you open up any new matter.

Mr. Graham: Do I understand that the plaintiffs have not offered their documents?

Mr. Flood: No. I withdrew that offer for the present.

Mr. Graham: I would like to ask leave to ask the witness questions concerning those exhibits [429] which have been identified for the record in the Pre-trial order, which are plaintiffs' exhibits, concerning which he has not been examined.

Mr. Flood: Do you mean the ones that I have not yet offered? I object to that, your Honor,—I object to any testimony with respect to any exhibit which I have not yet offered.

The Court: I hear counsel's words but for some reason they do not carry any clarification to me.

Mr. Graham: They are offered by stipulation, referring to part(c), of the Pre-trial Order.

Mr. Paul: Your Honor, the stipulation is that we will be the filing of the stipulation and the signature of the court, upon our case in chief,—they are offered.

Mr. Flood: Certainly at this stage no examination with respect to those exhibits is proper. It is entirely premature if they are ever proper.

The Court: The court takes that view, with the right to recall this or any other witness.

Mr. Graham: May I ask permission to call this witness out of turn, as he is an important witness

(Testimony of Ray H. Northcutt.)

and has matters that require that he be out of the city? I ask permission to recall him with regard to three or four exhibits which have been identified in the [430] Pre-trial Order. It would be a great convenience to the witness and to counsel and I am certain it will not confuse the issues or the record here in the cause.

The Court: Have you any objection?

Mr. Flood: I don't know. I am entirely unprepared for that. I have never heretofore consented to the examination of the witness with respect to matters which are not in evidence. I am certainly very reluctant to do anything here which would interfere with Mr. Northcutt's convenience.

(Short conference off the record.)

Mr. Graham: Your Honor, it is agreeable between counsel that a stipulation be entered into that following the defendants' case in chief—pardon me—following the plaintiffs' defense to the defendants' in chief, that if this witness were called to the witness stand and were examined with reference to Exhibits numbered 68, 69, 70 and 71, he would testify with respect to each and all of those exhibits that the letters themselves, or documents referred to, or copies thereof did not come to his attention,—or so far as his knowledge goes—to the attention of any officer or agency of the defendant, Guy F. Atkinson Company, [431] and that his attention was first called to them in the trial of Cause Number 1301, and consolidated causes before Judge Black of the other division of this court during the second week of September, 1947.

(Testimony of Ray H. Northcutt.)

Is that stipulation agreeable?

Mr. Flood: Does that also include that he had no knowledge of their contents,—no knowledge of the subject matter?

Mr. Graham (continuing): Further, that he had no information concerning said documents nor any knowledge of the contents of said documents.

Q. (By Mr. Flood): Is that substantially what you would testify to, Mr. Northcutt?

A. Yes, sir,—68, 69, 70, and 71.

Mr. Flood: We stipulate that that would be his testimony.

Mr. Graham: If I understand then, your Honor, it is the stipulation of all counsel here that such stipulation may be offered by the defendants as their rebuttal, following the offering of these exhibits, if the same be offered by the plaintiffs. Is that understood?

Mr. Flood: That is agreeable.

The Court: Is there anything further of this [432] witness?

Mr. Graham: Yes. I have one or two questions, your Honor.

Redirect Examination

By Mr. Graham:

Q. Mr. Northcutt, would you refer to Exhibits 79 and 81, concerning which Mr. Flood recently directed your attention, being the procurement regulation.

A. Yes, sir.

Q. If I recall your testimony, Mr. Northcutt—

Mr. Flood: Just a moment. That testimony was just a short time ago and Mr. Northcutt hasn't ever

(Testimony of Ray H. Northcutt.)

indicated that he needed his recollection refreshed. I think the proper thing for counsel to do is to propound a question and elicit an answer.

The Court: Objection sustained.

Q. (By Mr. Graham): Directing your attention to the attachment, being the final pages of Exhibit 79, entitled "A memorandum of agreement on procedure for handling Fair Labor Standards Act claims against cost-plus-a-fixed-fee contractors" which document consists of four pages and purports to be signed by Robert B. Patterson, for the War Department, Mr. H. Struve Hensel, Assistant [433] Secretary for the Navy Department, Mr. E. S. Land, for the War Shipping Administration and the Maritime Commission, Mr. Tom C. Clark for the Department of Justice, and Mr. L. Metcalfe Walling for the Department of Labor, I will ask you when was the first time there came to your attention or your knowledge any memorandum or agreement, original, revised or otherwise, relating to the same subject matter, and signed by representatives of the departments there indicated?

Mr. Flood: I object upon the ground that it is just bare repetition. The same question was asked by Mr. DeGarmo of the same witness this morning and I am willing to have my recollection checked by the reporter but it is my definite recollection that he said he didn't know.

The Court: Mr. Northcutt, do you remember such a question being asked of you this morning?

The Witness: Yes, sir.

(Testimony of Ray H. Northcutt.)

The Court: What was your answer?

A. Substantially the question this morning I believe was did I have knowledge of Exhibit 79 which included this memorandum, and my answer was that it was subsequent to the 15th of November, that is, subsequent to its transmittal to us. I had not known of it before. [434]

The Court: Does that cover your inquiry?

Mr. Graham: If the Court please, since that time Counsel by inquiry relating to Exhibit 81, purportedly issued in the spring of 1944, attempted to impeach that statement.

Mr. Flood: Not in the slightest. That was not the intention at all.

The Court: Is there anything further?

Mr. Graham: That is all.

The Court: May the witness be excused?

Mr. Flood: I think we have exhausted the knowledge of the witness.

The Court: I think all of those connected with the trial, as I do, must feel indebted to Mr. Northcutt for his manifestation of extreme patience toward all of us in our questioning upon this matter.

The Witness: Thank you, your Honor.

(Witness excused.) [435]

JOHN IRVINE NOBLE,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Will you state your name, please?

A. John Irvine Noble.

Q. Where is your place of residence, Mr. Noble?

A. In Seattle, just outside of the city limits.

Q. By what organization are you employed?

A. The Corps of Engineers.

Q. For what period or length of time have you been so employed?

A. Since January, 1941 to the present.

Q. What is your present office or position with the Corps of Engineers?

A. I am the Assistant Chief of the Alaska Division of the Seattle District Office.

Q. During the years 1943, 1944, and 1945 by what organization were you employed?

A. The District Office of the Corps of Engineers, Seattle.

Q. What position or office did you hold during that period of time? [436]

A. At that time I was Chief of the Contract Projects Branch of the Alaska Division of the District Office.

Q. Will you speak a little louder, Mr. Noble? I had difficulty hearing you and I think Mr. Flood does, also.

(Testimony of John Irvine Noble.)

A. Chief of the Contracts Projects Branch of the Alaska Division, Seattle District Office.

Q. Will you explain to us, Mr. Noble, just what is the Corps of Engineers?

A. Well, the Corps of Engineers is a part of the Army. During the war it was that branch that was charged with military construction and the supply of military construction materials, and was part of the Army Supply Forces as distinguished from the ground forces and the air forces. Those were the three main divisions of the Army.

Q. You have spoken of your employment as being in the Seattle District Office. Will you state for the record what is the Seattle District Engineer?

A. The Seattle District Engineer is the head of the Seattle District Office which is a branch office,—one of many branch offices of the Corps of Engineers. The Chief of Engineers has his office in Washington, D. C.

Q. Can you give us some idea of the personnel strength of this Seattle District Office during the period involved [437] in these cases, '42, '43, '44 and '45?

A. It was in excess of 3500.

Q. What is the fact, Mr. Noble, as to whether Alaska had a branch of the Corps of Engineers, also, during this period?

A. No. There was no district office in Alaska at that time.

Q. Then what if any function did the Seattle District Office perform with respect to the Alaska construction projects?

(Testimony of John Irvine Noble.)

A. Well, the Alaska construction was one of the duties of the Commanding General of the Alaska theatre which was an overseas theatre,—like the North African theatre, or the South Pacific theatre. The Seattle District Office of the Corps of Engineers was charged with the support from the Continental United States of the Commanding General in matters of construction and supply.

Q. Who was the person who was directly responsible for the construction activities in the Alaska theatre of war?

A. Well, under the Commanding General the man responsible was known as the Department Engineer, or Engineer Alaskan Department, who was one of the staff officers of the Commanding General.

Q. Was that person located in Alaska or in Seattle? [438]

A. He was located in Alaska.

Q. In connection with your duties in the Seattle District Office of the Corps of Engineers, Mr. Noble, are you able to state what was the mission of the Alaska Department?

A. Yes.

Mr. Flood: I haven't objected to any question which tends to qualify this witness, although I admit his qualifications as an engineer or representative of the War Department. Now, I think we are going far afield when we are getting into the mission of a particular branch of the Army during the late war. There are going to be books written on that subject, if there haven't been already, but it won't be taken from this record.

The Court: Objection overruled.

(Testimony of John Irvine Noble.)

A. The mission of the Commanding General was to defend the territorial possessions of the United States.

Mr. Flood: Is this of this witness' knowledge? I object to that again.

The Court: If this knowledge was gained by the witness through his wartime employment, he may state such answer now.

Mr. DeGarmo: I assumed that his answers would only be in connection with his knowledge that he gained [439] as a result of his employment in the Seattle office of District Engineers. I believe the witness will not state anything of which he does not have personal knowledge.

The Court: You are directed to answer of your own personal knowledge, unless you state otherwise, so everyone will know that your answers are not so confined.

(The last answer of the witness was repeated as follows:

“Answer: The mission of the Commanding General was to defend territorial possessions of the United States.”)

The Witness: I wish to add: And to take those steps necessary to carry the war to the enemy.

Q. (By Mr. DeGarmo): You have stated that the person directly in charge of this Alaskan construction work under the Commanding General was the Engineer of the Alaskan Department.

I want to ask you if that person actually did the work of the construction; that is, if he actually directed it himself?

(Testimony of John Irvine Noble.)

A. Well, from the executive top level. But he had his [440] Post Engineers at each station who acted for him in the immediate direction of the construction work.

Q. Was there anyone who acted for him in the Seattle District Office of the Corps of Engineers?

A. Yes. There were several at various times. Whoever held the position as Chief of the Alaska Division was delegated authority to act for him, and the Seattle District Engineer was delegated that authority and some of the other personnel of the Alaska Division were also delegated that authority.

Q. Now, the term as used in certain exhibits in this case of "Contracting Officer," will you tell us who is a Contracting Officer and how he gets to be such?

Mr. Flood: I object to the question, your Honor, as there being no foundation, that this is not the best evidence. The prime contract, Exhibit 13, describes what his functions are.

The Court: The objection is sustained. Qualify the witness.

Q. (By Mr. DeGarmo): Mr. Noble, under the contract which is in evidence here, Defendants' Exhibit 13, Contract 202 of the Guy F. Atkinson Company, who was the Contracting Officer under that particular contract?

The Court: If you know. [441]

A. General Nold signed the contract as Prime Contracting Officer.

(Testimony of John Irvine Noble.)

Q. (By Mr. DeGarmo): Were there other prime Contracting Officers under him?

A. Yes; many of them.

Q. Were you such a prime Contracting Officer?

A. I was one of them.

Q. Were you a Contracting Officer under other contracts than the 202 contract?

A. Yes. I held the same authority with regard to all of the contracts here under consideration.

Mr. DeGarmo: I do not know if Counsel for the plaintiffs wish us to identify each of these separately. We wish to offer those which are commonly referred to as the basic authority documents, which as the present trial order states and stipulates are for the purpose of showing that the War Department was an agency of the United States. I now offer these exhibits without further identification.

Mr. Flood: We have no objection to their being admitted as provided for in Section 2.

The Court: Defendants' Exhibits 1 to 12.

(Defendants' Exhibits 1 to 12, inclusive, received in evidence.) [442]

Mr. Graham: So that the record is clear, the present trial order preserves objections as to—

The Court: I think we went over that in your absence. I now again state that whatever objections were preserved in the pre-trial order as to exhibits may be urged at any time. For the trial judge's convenience at the trial, the court requests that qualifying and authenticating evidence as to these exhibits be introduced as has already been

(Testimony of John Irvine Noble.)

done and the court has ruled upon, to give the court an idea in the presence of the litigants and their counsel as to whether these documents are admissible.

Q. (By Mr. DeGarmo): Mr. Noble, getting back to the Seattle District Office with which you were connected and of which you were a member, what relationship did it have to the Alaska Department and in particular with the department engineer who was a prime contracting officer under these contracts?

A. The supporting portion consisted of a great many details,—the procurement of construction materials as distinguished from munitions, the coordination and delivery of those materials, the financing and accounting functions. We paid most of his bills through the Seattle District Office. We procured and delivered floating [443] plants, barges and tugs,—just all of the background supply of the construction engineer.

Q. You have stated that you were the Chief of the contract projects branch of the Seattle District Office and that you were also a Contracting Officer under these several contracts. Now, will you state—just briefly so that the court may have the picture—as to what your duties were in those capacities?

A. The contracts covered military construction in Alaska. Of necessity they had a headquarters office in Seattle which for the purpose of the contract performed these functions of supply of ma-

(Testimony of John Irvine Noble.)

terials and men and all things necessary to perform the work. The contracts are such that they require the Contracting Officer to administer and supervise—

Mr. Flood: If your Honor please, I object to any testimony by this witness as to what the contracts required. They speak for themselves and nothing this witness can say will add to or vary what the contracts require.

The Court: You can't say how it turned out in connection with the contracts you were dealing with.

Q. (By Mr. DeGarmo): I want to know what you did in connection with the contracts. [444]

A. I performed those many functions of approval, certification or other authorizations as the terms of the contract stipulated or required.

Q. To be done by the Contracting Officer?

A. To be done by the Contracting Officer; and that covers all phases of the necessary work in connection with the mainland support of the construction.

Q. As a part of your duties, as Contracting Officer and as Chief of the Contracts Branch, were you concerned with the question of wages, hours, and overtime payments?

A. I was concerned with that and many, many other things.

Q. What is the fact, Mr. Noble, whether you as the Contracting Officer under the several contracts involved here initiated regulations and instructions to the contractors with respect to such things as wages, wage rates, and overtime practices?

(Testimony of John Irvine Noble.)

A. I initiated essentially all of the instructions to the contractors.

Mr. Flood: I think we are entitled to know whether they were oral or in writing.

The Court: You may state that.

The Witness: In writing.

Mr. Flood: Writing.

The Court: You refer to written contracts?

The Witness: Written instructions. [445]

Miss Krug: I didn't hear.

The Court: Written instructions.

Q. (By Mr. DeGarmo): How would communications which came to the Office of the District Engineer of the Corps of Engineers in Seattle be communicated to the several contractors performing work in the Alaska Division?

A. Normally by letter from the Contracting Officer.

Q. Mr. Noble, at the inception of the Guy F. Atkinson Contract Number 202, what if any difficulties were encountered with respect to the establishment of wage scales?

A. We were given to understand that we could not modify the wage scales that had prevailed on previous contracts of the Atkinson Company, West Construction Company, and others, that had operated contracts between 1941 and '42 and early '43.

Mr. Flood: I object to the answer unless it be specified whether the understanding that he spoke of was derived from oral conversations or writings.

Q. (By Mr. DeGarmo): Can you clarify that, Mr. Noble?

(Testimony of John Irvine Noble.)

A. It was derived from writing,—in particular the perusal of Executive Order 9250 and the Wage Stabilization Act. [446]

Q. Prior to the 202 Contract of Guy F. Atkinson Company, what contractors had been engaged in the performance of work for the War Department in the Alaska theatre?

A. On our work primarily West Construction Company and Guy F. Atkinson Company.

Q. I think you have partially answered—you have stated the problem—but what was the reason for the difficulty which was encountered with respect to this wage problem?

A. We understood that we could not make any changes without the approval of constituted authority, but we recognized that the changing conditions attendant to the new work, the necessity for haste, which meant long working hours, and the changed location all made it—well, the changing economy of the country as a whole all made it essential that in order to attract the workmen necessary—the workers necessary—that we modify the non-manual wage scales. We adjusted them upward, the gross remuneration.

Q. Was it your understanding, Mr. Noble, that that could not be done without approval of Executive Order Number 9250?

A. That was my understanding.

Q. Will you refer to Exhibit Number 25?

A. Yes. [447]

The Court: Was this last statement about the

(Testimony of John Irvine Noble.)

effect of Executive Order 9250 with reference to non-manuals or some other kind of workmen?

The Witness: Non-manuals.

Q. (By Mr. DeGarmo): I wish to ask you with respect to this document, Exhibit Number 25, Mr. Noble, if you were familiar with that document prior to the time it was transferred by Major Tait to the Guy F. Atkinson Company?

A. Yes, I was familiar with it.

Q. Was it by this letter, Mr. Noble, that your office notified the contractors that it was advisable to secure the approval of the new wage structure?

A. Yes. The submission referred to had incorporated the same base wages as had been used on previous contracts and that had been accompanied by recommendations for changes; and this letter advising that such changes could only be approved by the Contracting Officer after permission to modify or change was gained from constituted authority.

Q. Will you also refer to Exhibit 27?

A. Yes.

Q. And state if that document gave the same information to the contractors except with respect to headquarters' [448] employees, Seattle office?

A. Yes; in effect the same information or the same instructions.

Q. State what steps were taken by your office, to your knowledge, Mr. Noble, or under your direction, with respect to securing approval of these proposed wage increases?

(Testimony of John Irvine Noble.)

A. We held conferences with the contractors assembled as a group and tried to analyze just what our problem was. And with an idea of what our problem was, we waited on the representatives of the War Labor Board and asked them—

Q. When you say “we,” can you tell us who went to the War Labor Board; and give us some idea of the date if that is possible.

A. Well, this letter is dated the 30th of November. I thought we went to the War Labor Board before that. It may be that we did and this letter was a confirmation of the instructions. Anyhow, it was before the end of 1943 that we went to the War Labor Board with our problems, presented our problems, told them that we were—

Q. You were going to tell us who went.

A. Oh; Mr. Northcutt of the Guy F. Atkinson Company; I am sure that Mr. McLeod of the West Construction Company [449] attended; I believe Major Tait was with us at that first meeting with the War Labor Board. Probably Mr. Doyle of the Guy F. Atkinson Company, the Personnel Manager, was also there. I know there was quite a group of us.

Q. Can you tell us what occurred on that occasion?

A. Well, we presented our problem and asked if they had jurisdiction. They advised us that they did have jurisdiction over the lower rank of employees. We said, “Well, how about this man”—and named the classification—and he said, “Well, we don’t know but you go to the Treasury Depart-

(Testimony of John Irvine Noble.)

ment and find out what jurisdiction they will assume and then come back to us for the rest of them." They provided us with a lot of forms for us to take home and study, and that is about as far as that went.

Q. What next was done?

A. Next the same group went to the Salary Stabilization Unit of the Treasury Department and presented our problem to them. There again we got a whole mess of forms. They didn't know precisely what their jurisdiction was or where the dividing line would be between the two agencies, so they asked us to make up a submission to them and they would review it, consider it, and take action upon it. During the month of December [450] the Contracting Officer collaborated in the preparation of such a submission. We prepared organization charts and salary schedules and some degree of job descriptions and presented the whole thing in the name of Guy F. Atkinson Company to the Salary Stabilization Unit of the Treasury Department.

Q. Without taking further time on that,—what was the result of that submission, Mr. Noble, if you know?

A. After considerable time—in fact, it was near the end of February—that the Salary Stabilization Unit of the Treasury Department advised Guy F. Atkinson Company to return this application or submission with the advice that since their home office was in San Francisco the submission would

(Testimony of John Irvine Noble.)

necessarily be made to the Salary Stabilization Unit in San Francisco. By inference West Construction Company would have had to submit theirs to the Salary Stabilization Unit in Boston. By that time we had Birch-Morrison-Knudsen in the picture and they would have had to submit their requests to Boise, Idaho, presumably, of Great Falls, Montana. Inland Construction Company would have had to send theirs in to Omaha. We also had Puget Sound Macco, then; that would have gone to Seattle.

Q. In view of this fact, what was done by the Seattle District Office of the Corps of Engineers?

A. Well, the Atkinson Company first went to an attorney and tried to find some way to get a centralized authority that would consider and move on these proposals. We had a very critical situation on the job. We had been working since early October and pressing the work very rapidly. Time was going by,—our payrolls were piling up and we still had no way to adjust these inequities. This attorney—

Q. Are you speaking of Mr. Mechem, now?

A. Mr. Mechem. He was trying to find a procedure that was workable for a uniform solution that could keep our five contractors working together in harmony. Just at that time, at the end of February, 1944, there was this general conference in Seattle of all of those interested in wages and working conditions in Alaska, including the Northwest Service Command and their contractors,

(Testimony of John Irvine Noble.)

who were working on the Alcan Highway, and the Prince Rupert port expansion and the telephone line and the other military improvements in Alaska. The Office of the Chief of Engineers, the Army Service Forces of the Commanding General Alaska Department—then the Alaska Defense Command—and the Commanding General of the Northwest Division, and some commercial interests were there.

The Court: That is sufficient for today. [452]

Court will be adjourned until tomorrow morning at 9:30.

Those connected with this case are excused until 10:00 o'clock, but court is adjourned until 9:30.

(At 4:47 o'clock, p.m., Thursday, December 11, 1947, court adjourned until 10:00 a.m., December 12, 1947.) [453]

Seattle, Washington

December 12, 1947, 10:00 o'clock, a.m.

The Court: You may proceed in the case on trial.

JOHN IRVINE NOBLE—(Resumed)

Direct Examination—(Continuing)

By Mr. DeGarmo:

Q. Mr. Noble, in your previous direct examination you referred to certain conferences had by you and other contractors' representatives with the War Labor Board.

I wish to ask you what if anything was said in

(Testimony of John Irvine Noble.)

such conferences concerning the Fair Labor Standards Act? A. Nothing.

Q. When the Court quit yesterday evening, you were just starting to testify with regard, I think, to a joint conference held in Seattle, between a group which you specified. Will you state what was done or what took place at that time?

A. Well, in reference to the matter that we are discussing, [454] we had found that presumably our applications to the authorities set up to administer the Wage Stabilization Act would have to be spread far and wide, and it was very discouraging because we could not see that we could achieve any uniformity by so doing. We told our trouble to the representatives of the War Department,—specifically Major Bedell of the Civilian Personnel Division of the Army Service Forces.

Q. Was he present at that meeting?

A. He was present at that meeting. And Mr. Curtis of the Labor Branch of the Office of the Chief of Engineers, and Major Bedell, stated that they had the authority to pass upon adjustments under the Wage Stabilization Act in wages, wage structures and other details of employment in connection with employees of the War Department and employees of cost-plus-fixed-fee contractors on War Department activities. He told us at that time that if we would make application to him or to the Secretary of War's office—of which he was a part—and if we would agree to abide entirely by their decision, that they would assume jurisdiction and would afford us a centralized

(Testimony of John Irvine Noble.)

authority who could pass on the problems of all of our contractors.

The Court: What date approximately was this?

The Witness: The date was the end of February, 1944.

The Court: Was that the first time any serious problems had arisen in connection with the rate of pay and the overtime of non-manuals?

The Witness: No, Your Honor; we had been struggling with this ever since the contract was entered into.

The Court: When was that?

The Witness: The contract date was the 30th of September, 1943.

Mr. Flood: Will Your Honor permit me to express an objection to the form of Your Honor's question, if I understood correctly?

The Court: You may note the objection.

Mr. Flood: It is assumed there was a difference between the non-manuals, whereas there had been a uniform policy in respect to non-manuals and an adherence thereto.

The Court: The objection is overruled.

Q. (By Mr. DeGarmo): When you said "we" in your answer to the previous question, were members of the contractors group present at that meeting?

A. I do not remember,—well, members of the contractors [456] were present at the general meeting. This particular discussion of our problem—of this specific problem—was discussed with Major Bedell and Major Sufferin and Mr. Curtis, and the con-

(Testimony of John Irvine Noble.)

tractors' representatives may or may not have been there. But it was a side discussion not in line with the general purpose of that meeting. The general purpose was to have all concerned agree upon primarily uniform policies in connection with manual workers.

Q. Following this conference in Seattle, and the matter which you have just referred to in your conference with Major Bedell, what occurred with reference to the matter of wage scales and job classifications, the question of overtime pay and similar matters of the contractors engaged in Alaska work?

Mr. Flood: I object to the question insofar as it relates to overtime pay—if it does relate to overtime pay for non-manuals—because it assumes something not in evidence.

The Court: The objection is overruled.

A. If the contractors were not present——

Q. (By Mr. DeGarmo): I asked you what was done in reference to these matters?

A. Well, the contractors were advised by me, if they hadn't [457] heard Bedell state the procedure. The contractors eagerly accepted his offer, either direct or through me. Then Major Bedell outlined to us the steps that would have to be taken to make our presentation. He was very insistent that the contractors all agree on explicit job descriptions in order to be able to present to Dr. Abersold's office a uniform front with reference to what the name meant.

After the conference disbanded, the contractors as a group and the contracting officers spent a great

(Testimony of John Irvine Noble.)

deal of time on the preparation of this application, preparing organization charts or reproducing organization charts that had been prepared by the prime contracting officer in the field, preparing recommended wage schedules, arguments in support of them and in—as I remember it—a series of night meetings that lasted several weeks, we hammered out these job descriptions that were the combined effort of the entire group.

Q. Mr. Noble, I will ask you if Exhibit 42 is the culmination of this work which you have just been referring to in your testimony? The Abersold submission is the one I am calling your attention to.

A. Yes; this is the submission which contains——

Mr. Flood: I submit the exhibit speaks for [458] itself as to what it contains.

Q. (By Mr. DeGarmo): The only question I asked you: Whether that work culminated in Exhibit 42?

A. Yes. That work culminated in Exhibit 42.

Q. Does Exhibit 42 include matters relative to overtime wages for non-manual employees?

Mr. Flood: Exhibit 42 speaks for itself, Your Honor.

The Court: The objection is overruled. It is already in evidence.

Mr. DeGarmo: Yes, it is.

The Court: The objection is overruled.

A. Yes, it does cover the——

The Court: I believe yes or no would be the answer.

(Testimony of John Irvine Noble.)

A. Yes.

Q. (By Mr. DeGarmo): Will you state what if any part circular letter 2236 and circular letter 2390 played in the provisions of Exhibit 42?

A. The policies concerning eligibility for over-time and provisions for other benefits such as leaves, holidays and what not as contained in this submission are strictly in accordance with the same provisions in [459] circular letter 2236 and circular letter 2390. In fact, they were copied from those circular letters with no material change as to the subject here under discussion. We may have made some slight modifications to adapt the circular letters to our Alaskan work.

Q. Mr. Noble, in what way were exhibits—I think 41 and 42—submitted to the War Department Wage Administration Agency? A. 41?

Q. I think it is 41 and 42. 41, I believe is the covering letter and 42 is the submission, if my notes are correct. A. No.

Q. No, I am wrong about that. Exhibit 42 alone,—I think the question should be restricted to Exhibit 42. In what manner was Exhibit 42 submitted to the War Department administration agency?

A. Officially the submission was made through the Chief of the Base Echelon of the Alaskan Department,—the Base Echelon being the military representative of the Alaskan Department, located in Seattle. That was processed by the Chief of the Base Echelon to the Office of the Secretary of War. That was the official transmittal. Actually, I took copies

(Testimony of John Irvine Noble.)

of them and proceeded [460] to Washington or to Philadelphia and sent to Washington for personal discussions with Dr. Abersold's office and the representative of the Office of the Chief of Engineers.

Q. Mr. Noble, either prior to the Abersold submission or subsequent thereto, did you make any statement as Contracting Officer to the contractors with reference to the applicability of the Fair Labor Standards Act to the work in which they were employed?

Mr. Flood: I object to that unless the question calls for or the answer specifies whether the statements, if any, were oral or in writing.

Mr. DeGarmo: I am asking first whether he made any. I want a yes or no answer to that.

The Court: The objection is overruled at this time. He may answer.

A. No.

Q. (By Mr. DeGarmo): For the purpose of refreshing your recollection, Mr. Noble, I wish to call your attention to Exhibit 75. Will you refer to that exhibit? A. Yes.

Q. Can you determine from that exhibit, Mr. Noble, whether you had anything to do with the preparation of it? A. Yes, I did. [461]

Q. Just what did you have to do with it?

A. Well, I collaborated in its preparation.

Q. Is there anything upon the exhibit itself which indicates that?

A. Yes; my initials up in the upper right-hand corner.

(Testimony of John Irvine Noble.)

Q. I wish to call your attention to the second paragraph on the second page of that letter,—the letter being dated April 13, 1944. By the way, first, is that date prior or subsequent to the Abersold submission?

A. The date is subsequent. I think the date on the transmittal letter of the Abersold submission is the 12th of April.

Q. As a matter of fact, Mr. Noble,—have you checked that?

A. That is right; the 12th of April.

Q. By reference to the second paragraph of this letter, I will ask you, Mr. Noble, again if that has refreshed your recollection as to whether you did or did not make any statements to the contractors as to the applicability of the Fair Labor Standards Act or the work on which they were employed?

A. Yes. In this letter I discussed not the applicability of the act so much as the explanation for circular letter 2390 and the overtime provisions therein.

Q. Mr. Noble, what if any oral instructions did you give [462] the contractors as to applicability of the Fair Labor Standards Act to the work in which they were employed or the necessity of their complying with such act?

Mr. Flood: I object to that, Your Honor, as being incompetent, irrelevant, and immaterial. It is purely repetitious. He was asked whether he made any statements to the contractors with reference to the applicability of the Fair Labor Standards Act and he said none.

The Court: Mr. DeGarmo, do you wish to make a response?

(Testimony of John Irvine Noble.)

Mr. DeGarmo: I think the previous question was not identical with the one just asked, and since that time I think I have refreshed the witness' recollection as to perhaps some statements he may have made, which he did not recall at the time by reference to Exhibit 75.

The Court: If it is upon the latter, I should think you ought to call his attention to that answer or something properly to bring it to his attention.

Mr. Flood: In his answer he said he discussed not so much the applicability of the Fair Labor Standards Act as the reason for circular letter 2390 and the provisions therein.

The Court: I think Counsel examining the witness is convinced the witness may have made a mistake and he ought to be at liberty to give the witness an opportunity to consider the situation again if he in good faith feels that way and then, if there is an inconsistency, he ought to be permitted to ask the question.

Q. (By Mr. DeGarmo): Mr. Noble, in response to a previous question which was, as I recall, "What if any statements either prior to the Abersold submission or subsequent thereto did you make to the contractors as to the applicability of the Fair Labor Standards Act to their operations" you replied, "No," that you had made none.

I now ask if upon reflection you still wish to adhere to that answer? You can answer that either yes or no,—that you do wish to or that you do not.

The Witness: Can we hear the original question?

(Testimony of John Irvine Noble.)

I did not understand it quite the way you repeated it.

The Court: That involves the reporter finding the original question.

Mr. DeGarmo: I think we will save time by having the reporter read the question. [464]

The Witness: Can I say this: I might qualify that statement——

The Court: Mr. Reporter, can you read the original question?

(Whereupon, the questions and answers referred to were read aloud as follows:

“Question (By Mr. DeGarmo): Mr. Noble, either prior to the Abersold submission or subsequent thereto, did you make any statement as Contracting Officer to the contractors with reference to the applicability of the Fair Labor Standards Act to the work in which they were employed-

“Answer: No.”)

A. No.

Q. You do not wish to adhere to that answer?

A. No.

Q. Will you state, first, whether any instructions by you to the contractors to which you may refer were either oral or in writing?

A. Any instructions?

Q. “Any statements” perhaps I should say, rather than instructions.

A. Well, in writing this Exhibit 75. [465]

Q. Were there any oral?

A. No, none that I know of.

(Testimony of John Irvine Noble.)

Q. Mr. Noble, are you familiar with Exhibit 16?

A. Yes, I have it here.

Q. What is the fact, Mr. Noble, as to whether Exhibit 16 is the response by the War Department Wage Administration Agency to the so-called Abersold submission, Exhibit 42?

A. Well, Exhibit 16 is the letter, signed by Dr. Abersold, transmitting the approved wage structure, including the initial employment and policies, the wage ranges and the job descriptions.

Q. To get back to the question—I don't think you have answered it yet—is that the response from the War Department Wage Administration Agency to the submission as contained in Exhibit 42?

A. Yes; this is the official approval.

Q. Was that approval placed in effect by the contractors; that is, did they operate under that?

A. Yes, they did.

Q. Insofar as you have knowledge, Mr. Noble, what is the fact as to whether the Guy F. Atkinson Co. complied with the various regulations, orders, rulings, and interpretations which I think in all instances came through your department,—the Seattle District [466] of the Corps of Engineers—and in particular, Mr. Noble I refer you to Exhibits 13 and 14, Exhibit 13 being the prime contract, Exhibit 14 being the circular letter 2236, Exhibit 15 being circular letter number 2390, Exhibit 16 being the Abersold Directive.

First, let me ask you with respect to those documents only.

(Testimony of John Irvine Noble.)

Mr. Flood: First of all, your Honor, I object to the gratuitous assumption presupposed in the question that Counsel hypothecates his own personal belief that in all instances they came through the Department of the Seattle office of the Corps of Engineers.

Mr. DeGarmo: I think that is the testimony.

The Court: The objection is overruled.

Mr. Flood: Secondly, I object to it, your Honor, on the grounds it is incompetent, irrelevant, and immaterial in that it calls upon this witness to decide an issue which is reserved for the Court,—one of the issues reserved solely for the Court. It invades the entire province of the Court with respect to one of the important issues in this case.

The Court: Overruled.

A. The Guy F. Atkinson Company and the other contractors [467] concerned did comply with all of these instructions and rulings.

Mr. Flood: Just to protect my objection, your Honor, I move that the answer be stricken in that it is a mere argumentative conclusion of the witness with regard to an issue which has to be found by this court, and that issue must be determined from what was done and not from the conclusion of the witness.

The Court: Overruled. Motion denied.

Q. (By Mr. DeGarmo): Mr. Noble, in order to save what I think is time, will you refer to the other exhibits which are before you, starting with Exhibit 17 and continuing through the other ex-

(Testimony of John Irvine Noble.)

hibits including Exhibit 67 and also Exhibits 74 through 79, inclusive, and state what if any instances you know, to your own knowledge, where any of the contractors, defendants in these cases, did not comply with the instructions, rulings, orders, interpretations or regulations as contained in those exhibits?

Mr. Flood: My objection to that is the classical objection that no affirmative conclusion can be derived from negative premises.

Mr. DeGarmo: I will withdraw the question and [468] rephrase it.

Q. (By Mr. DeGarmo): Will you state, Mr. Noble, what is the fact as to whether the contractor defendants in these cases, the Guy F. Atkinson Company, the Birch-Morrison-Knudsen Company, and the West Construction Company, complied insofar as you have knowledge with the instructions, rulings, regulations, orders and interpretations as contained in the exhibits which are before you numbered 17 to 67, inclusive, and 74 to 79, inclusive.

Mr. Flood: For the record, your Honor, the same objection upon the same grounds, please; and specifically to this question that it assumes that every jot and tittle of those exhibits, 17 to 67 and 74 to 79 are rulings, orders and directive,—which assumption is contrary to the record.

Mr. DeGarmo: I don't think the question assumes that, if your Honor please. I asked him with respect to such orders and so forth as there are in those exhibits.

(Testimony of John Irvine Noble.)

Mr. Flood: Then that permits the witness to exercise his own opinion as to what is and what is not an order and directive, which is purely a question of law for the Court to determine. My objection, [469] for the record, your Honor.

The Court: Overruled.

A. Barring human and mechanical errors, they complied with all the instructions and directives of the Contracting Officer.

The Court: With what Officer?

The Witness: The Contracting Officer.

Mr. DeGarmo: If your Honor please, because Mr. Graham is more familiar with Exhibits 1 to 12 than I, I ask permission for him to ask some of the questions of this witness merely for the purpose of identifying for your Honor's convenience the Exhibits 1 to 12 which are in evidence.

The Court: That request is granted.

Q. (By Mr. Graham): Mr. Noble, will you refer to the first volume of the exhibits, being Exhibits 1 to 12. A. Yes, sir.

Q. Would you refer, Mr. Noble, to Exhibit 1, subdivision a. A. Yes.

Q. What is that exhibit, sir?

A. It is a letter from the Adjutant General's Office, addressed to the Commanding General, Western Defense [470] Command, on March 11th, 1942, on the subject of responsibility as to construction and real estate activities.

Q. Can you state whether or not this exhibit is in the form, Mr. Noble, of the official instructions

(Testimony of John Irvine Noble.)

of the War Department to the various theatre commanders?

A. It is the official instructions from the War Department headquarters to the Commanding General of the Western Defense Command which is one of the theatre commanders, and assigned to him the responsibility for military construction in his theatre.

Q. Did that theatre at that time include Alaska?

A. It included Alaska at that time.

Q. Now, will you refer to Exhibit Number 1, subdivision b, and will you state what that document is?

A. Well, that is the letter from the Commanding General of the Western Defense Command to the Commanding General of the Alaska Defense Command, through the Division Engineer at Portland and the District Engineer at Seattle, passing on to the Commanding General of the Alaska Defense Command the responsibility for this same construction that was delegated to him in the previous order.

Q. Was the Commanding General of the Alaska Defense Command under the jurisdiction of the Commanding [474] General of the Western Defense Command at that time?

A. Yes, he was under the jurisdiction of the Western Defense Command.

Q. Will you refer to Exhibit Number 1, subdivision c. A. Yes.

The Court: At this time those connected with this case are excused for about five minutes.

(Testimony of John Irvine Noble.)

(Short recess.)

Q. (By Mr. Graham): And what is that document, Mr. Noble? A. This is a—

Q. Calling your attention to the top of the second page thereof.

A. A letter from the Commanding General, Western Defense Command, to the Chief of Engineers, requesting the Chief of Engineers to authorize the carrying on by the Corps of Engineers the work that had previously been done for Alaska.

Q. What are the third, fourth and fifth pages of that exhibit, Mr. Noble?

A. Endorsements—

Q. What are the endorsements?

A. They are answers or carrying it through to accomplish the initial request; first from the Office of the [472] Chief of Engineers to the Commanding General Western Defense Command, and then from the Western Defense Command to the Division Engineer, and then passed on from the Division Engineer to the District Engineer.

Q. Now, will you refer to Exhibit 1, subdivision d, and also will you please refer to Exhibits Number 2 and Number 3? A. Yes.

Q. And will you state where those three documents are; that is, numbers 1, subdivision d, and Exhibits Numbers 2 and 3?

A. 1-d is from the headquarters, Western Defense Command, to the District Engineers, Seattle, appointing the District Engineer as Contracting Officer for military construction activities in real

(Testimony of John Irvine Noble.)

estate leases in Alaska and other authorizations to act for the Commanding General.

Q. What is Number 2?

A. Number 2 is the specific appointment from the Western Defense Command to the Officer in Charge of Alaska construction at Anchorage, giving him contracting officer authority.

Q. What is Exhibit Number 3?

A. Number 3 from the Western Defense Command to the [473] Commanding General, Alaska Defense Command, delegating authority to the Commanding General, Alaska Defense Command, pertaining to construction activities and real estate leases.

Q. This last Exhibit 3, does that augment the authority conferred by Exhibit Number 1-b?

A. 1-d?

Q. 1-b. A. One, what?

Q. "b." A. Yes. It becomes specific.

Q. Without indicating the subject of those matters at this point, would you refer now to Exhibit Number 1, subdivision e? A. Yes.

Q. Will you state what that document is?

A. It is from the Chief of Engineers to the Division Engineer, expressing the approval of the Chief of Engineers for the District Engineers, Seattle, to continue the duties desired by the Western Defense Command.

Q. Without indicating them in detail, Mr. Noble, what were those duties of the Engineers insofar as the construction work in Alaska was concerned?

(Testimony of John Irvine Noble.)

A. As I explained in some detail yesterday, they were [474] the supporting activities necessary on the mainland in supply and engineering and fiscal matters, assisting the Alaska Defense Command, at that time, in the performance of their construction activities.

Q. Now referring you to Exhibits 1-g and 1-h, I will ask you whether or not those documents and the instructions therein contained took the place of Exhibit Number 3,—or whether or not those exhibits 1-g and 1-h are a restatement of the authorities previously concerned, which you have testified,—particularly Exhibit 3?

A. Well, Exhibit 3 is dated “4, May, 1942” and these are both in the summer of 1943—

Q. My question is whether or not these exhibits dated 1943,—whether or not they constituted a restatement of the authority previously stated in the other documents, only in different form?

A. Yes; they reiterated that authority.

Q. Will you refer to Exhibit Number 4-b; can you state what that exhibit number 4-b is?

A. It is a teletype from the Adjutant General, dated September 5, 1941, to the Alaska Defense Command, relieving—

The Court: Concerning what subject? Don't state what it says. [475]

A. (Continuing): Well, assigning General Nold,—or at that time Lt. Col. Nold—to duty as engineer on the staff of the Alaska Defense Command.

Q. (By Mr. Graham): Is that Col. Nold

(Testimony of John Irvine Noble.)

therein referred to the same individual who signed the prime contract here in evidence as Exhibit Number 13?

A. The same individual.

Q. And in the same capacity as head of the staff?

A. As Commander of the Alaska Defense Command.

Q. In what capacity?

A. It simply transfers him from one station to another. It transfers Lt. Col. Nold.

Q. Now, Mr. Noble, would you refer to Exhibit Number 5?

A. Yes.

Q. I will ask you what change took place on or about November 1st with reference to the Alaska Military Theatre of operations?

The Court: Do you mean what change if any?

Mr. Graham: What change, if any, yes.

A. November 1st, 1943, the Alaska Defense Command changed their name to the Alaska Department and was made directly responsible to the staff in Washington rather than the Commanding General of the Western Defense Command. [476]

The Court: At San Francisco?

The Witness: At San Francisco.

Q. (By Mr. Graham): Referring you to Exhibit Number 5, will you state what that is?

A. War Department General Order.

Q. What number?

A. 67.

Q. Referring you to the paragraph I thereof, can you state to what that portion of the order refers; what is the subject matter of the paragraph

(Testimony of John Irvine Noble.)

I of General Order Number 67, being Exhibit Number 5?

A. Well, this is redesignation of the Alaska Defense Command and establishing it, severed from the Western Defense Command, as a separate theatre of operation.

Q. That is what this document does for General Order Number 67? A. Yes.

Q. Now would you refer to Exhibit Number 6, and will you state what that exhibit is?

The Court: Try to avoid stating the contents of the exhibit; just state what the nature of the subject is which it covers; just state the nature of the subject it relates to.

A. It is a letter from the War Department, Adjutant [477] General to the Commanding General of the Alaskan Department.

Q. (By Mr. Graham): What is the subject matter of the letter?

A. Instructing him as to his duties.

Q. Instructing him as to duties with respect to what subject matter?

Mr. Graham: I may save some time, your Honor, if I may ask the witness if it relates to military construction.

A. Well, I don't know whether it is exclusively that.

The Court: It wouldn't have to be exclusively that.

Does it do that, among other things?

The Witness: Yes, it does.

(Testimony of John Irvine Noble.)

Q. (By Mr. Graham): Now would you refer to Exhibit Number 7? A. Yes.

Q. What is that document?

A. From the Commanding General, Alaska Department, to the District Engineer, Seattle, Washington.

Q. The date? A. On 26 November 1943.

Q. Did you state from whom that document was?

A. Yes; the Commanding General, Alaskan Department.

Q. What is the subject matter of that document?

A. It requests the District Engineer to continue in support of the Alaska Department as previously in support of the Alaska Defense Command.

Q. Will you refer to Exhibit Number 8?

A. Yes.

Q. Will you state what Exhibit Number 8 is?

A. From the Office of the Chief of Engineers in Washington to the Division Engineer, now moved to Salt Lake City. That expressed the approval of the Office of the Chief of Engineers in continuation of his activities in support of the Alaska Department.

Q. Referring to the endorsement on the second page, will you state whether that was transmitted through channels to the District Office of the Engineers, Seattle?

A. Yes. The first endorsement transmits it from the Division Engineer to the Seattle District Engineer.

Q. Will you refer to Exhibit Number 9?

(Testimony of John Irvine Noble.)

A. Yes.

Q. Will you state what that document is?

A. From the Engineer, Alaska Department, to the District Engineer in Seattle, outlining the procedures to be [479] followed in support of the Alaska Department in administration of cost-plus-fixed-fee contracts.

Q. Now, will you refer to Exhibit Number 10?

A. Yes.

Q. Can you state what Exhibit Number 10 is?

A. It is a circular letter going back to December 4th, 1941.

Q. What is the circular letter number?

A. Number 248.

Q. And referring your attention to Paragraph I of War Department Circular Letter Number 248, can you state what the subject matter of that portion of the circular is?

A. That transferred military construction activities from the Quartermaster Corps to the Corps of Engineers prior to the establishment of the Alaska Defense Command.

Q. Now, will you refer to Exhibit Number 11?

A. Yes.

Q. What is Exhibit Number 11?

A. It is a War Department circular, number 59, outlining the reorganization of the War Department; and of interest here is the placing of the Corps of Engineers—at that time Services of Supply of the Army—which later became what I referred to as the Army Supply [480] Forces.

(Testimony of John Irvine Noble.)

Q. Is that what has been previously termed in this testimony "Army Service Forces"?

A. Army Service Forces, yes; excuse me.

Q. Would you refer to the last page of this exhibit number 59? Yes. Circular 59?

Q. Of this War Department Circular Number 59, would you refer to the last page, being the reorganization chart.

The Court: Would you kindly refer to it by the number which has been given it by the clerk?

Mr. Graham: It is Exhibit 11, your Honor.

A. Yes.

Q. (By Mr. Graham): What is that,—the last page of this exhibit number 11?

A. That is the organization chart of the Services of Supply.

Q. Does the Corps of Engineers appear thereon?

A. Yes.

Q. Would you refer to Exhibit Number 12?

A. Yes.

Q. What is Exhibit Number 12?

A. Army Regulation Number 100-70, issued November 5, [481] 1942.

Q. What is the subject matter of Army Regulation 100-70?

A. The authority and responsibility of the Chief of Engineers.

Mr. Graham: I would like to call the attention of the Court to this paragraph numbered 11 without the necessity of inquiring of the witness.

Paragraph 11, on page 3 of this Exhibit Number 12 which reads: "Labor Relations."

(Testimony of John Irvine Noble.)

“As the maintenance of proper relations between management, labor and government is essential to the efficient and expeditious conduct of construction work, the Chief of Engineers will maintain the necessary organization to insure that proper labor relations are established and maintained, that labor laws are correctly administered and that proper wage rate structures and an adequate labor supply are maintained on all new work under his jurisdiction.”

Q. (By Mr. Graham): My attention is called, Mr. Noble, to the fact that I neglected to inquire of one portion [482] of Exhibit Number 1. Will you refer back to Exhibit Number 1, Subdivision f, and will you state what that is?

A. A letter from the Headquarters, Western Defense Command, to the Commanding General, Alaska Defense Command, on the subject of the appointment of certifying and contracting officers.

Q. Calling your attention to my previous question relating to Exhibit Number 1-g and 1-f and their relationship to Exhibit Number 1-d, and to Exhibits Numbers 2 and 3, I will ask you whether or not the same relationship holds true of Exhibit 1-f, being dated July 17th, 1943 to the prior Exhibits Numbers 1-d and 2, and 3 dated May 4, 1942, —and specifically the relationship between 1-f and 1-d?

A. Yes. 1-f is on the same subject matter and supersedes 1-d.

Mr. Graham: I think I have no further questions, your Honor.

(Testimony of John Irvine Noble.)

The Court: The plaintiff may cross-examine.

Cross Examination

By Mr. Flood:

Q. In connection with your submission in which you collaborated with the contracting companies, on a [483] great deal of data with the agency of the War Labor Board in connection with which you went to Philadelphia and to Washington, all of that work was done and your submission was prepared, was it not, to obtain the approval under Executive Order Number 9250 of initial wage rates and of salary increases in conformity with the Wage Stabilization Act?

A. Well, you said "submission to the War Labor Board." That was not a submission to the War Labor Board.

Q. It was a submission to the War Department Wage Stabilization Agency?

A. War Department Wage Stabilization Agency.

Q. And that department had been delegated by the War Labor Board to represent the War Labor Board on approving approval of war contracts, had it not?

A. That and delegated by the Wage Stabilization Unit of the Treasury Department, both.

Q. The Wage Stabilization Unit of the Treasury Department was delegated by the War Labor Board to pass upon wage structures in a certain category under the three per cent rule, is that right?

A. Not to my knowledge. I think it was direct from the Director of Wage Stabilization.

Mr. DeGarmo: If your Honor please, I think in

(Testimony of John Irvine Noble.)

the discussion of the technicalities of which [484] department it was that that question hasn't been answered. I would like to have the question answered for the record because I am afraid now that it is misleading. I would like to have the question answered directly if there is an answer to the original question.

The Court: The Court will not require Counsel examining to propound the question but will reserve the right to defendant counsel to redirect upon this point.

Q. (By Mr. Flood): In other words, Mr. Noble, your answer was that the agency of the Commissioner of Internal Revenue which passed upon these increases was an agency delegated to exercise that power delegated by the Wage Stabilization Director? A. May I have that question again?

Mr. Flood: If it is not clear, I will try to ask him more simply, although I have a hard time asking simple questions.

Q. (By Mr. Flood): In other words, the Wage Stabilization Act of October, 1942, required that thereafter all wage structures,—all wage increases would have to have approval under the authority of the Wage Stabilization Act, did it not? [485]

A. That is correct, yes.

Q. And the Wage Stabilization Act authorized the Director to delegate the function of passing upon such approval in some instances to the Commissioner of Internal Revenue and his representatives in other instances to the War Labor Board,

(Testimony of John Irvine Noble.)

and in other instances to the War Department Wage Administration Agency? A. Yes.

Q. That is all pretty well set forth, is it not, in Exhibit 61, if you wish to refer to it to refresh your recollection? A. Yes, it seems so.

Q. You are familiar with the contents of that exhibit? A. Yes.

Q. By the way, who is Captain Burke, Corps of Engineers, Chief of Labor Relations Branch, who signed the enclosed letter dated January 15, 1945?

A. He was the Chief of the Labor Branch of the Division Office which was then located in San Francisco—the Pacific Division—located in San Francisco, he was then the Chief of the Labor Branch.

Q. The problem you had of preparing this submission which later resulted in the Abersold Directive related entirely to complying with the requirements of the Wage [486] Stabilization Act with reference to approval of wage increases and initial wage rates on new employment, did it not?

A. Yes.

Q. Did the Wage Stabilization Act require any modification of your procedure under your order, as you call it, 2236?

A. None that were known to us.

Q. Under 2236, approval was not necessary, was it; as long as the contractor paid wage rates within the minima-maxima of 2236, no approval of any other agency was necessary, was it?

A. No, no approval of any other agency. They still had to get specific approval from the Contracting Officer.

(Testimony of John Irvine Noble.)

Q. That, of course, was provided for in the express terms of the contract, wasn't it?

A. Yes.

Q. Under your amendment to 2236, in 2390, was approval of wage increases by any other agency necessary?

Mr. DeGarmo: At what time, if your Honor please?

Q. (By Mr. Flood, continuing): Well, under 2390. When did 2390 become effective? It speaks for itself in Exhibit 16. [487]

The Court: The objection is overruled.

A. 2390 came out in the late spring of 1943 and set up certain provisions; and by its terms those provisions were required to be incorporated in future contracts,—contracts entered into thereafter. If the contractor could operate within the wage ranges set forth therein, no further approval was necessary.

Q. Did the War Department Wage Administrative Agency have any function in approving the schedule of the contractors after the effective date of 2390?

Mr. Graham: I confess I don't understand what is meant by the question, your Honor. May I have the question read?

(Last question read aloud by the reporter.)

Q. (By Mr. Flood): I ask you to read paragraph 6 of page 2 of the contract of January 16th, 1945, Exhibit 61. A. I have 61.

What was the paragraph?

Q. Paragraph 6 of Captain Burke's letter.

(Testimony of John Irvine Noble.)

A. Yes. Now, what was the question?

Q. I will ask you this about it: Did Circular 2390 require approval of the Wage Administration Agency for wage or salary schedules on contracts effective [488] after its date?

A. Well, 2390 was set up as explained in Paragraph 6, as a uniform schedule acceptable and already approved by the War Department Wage Administrative Agency under which a contractor could operate if he so elected and found himself able to. If a contractor had other policies of his own by prevailing practice in his own organization, or if he found it necessary to deviate from the wage ranges set forth in 2390, then he couldn't operate without further approval on his specific problem.

Q. Then what you mean to say is that if his base wage schedules were within the maximum limits specified in 2390, he was not required mandatorially to follow the schedules laid out in 2390?

Mr. Graham: I would like to ask the reporter to read Mr. Noble's answer. I think Mr. Flood has completely misstated what the witness said.

Mr. Flood: Strike the question.

Q. (By Mr. Flood): Basic policies and job classifications and salary schedules of Circular Letter 2390 are not mandatory upon contractors having to perform work for the Department?

A. That is correct. [489]

Q. Such contractors can establish their own schedules, can they not, so long as they fall within the maximum and minimum limits of 2390?

(Testimony of John Irvine Noble.)

A. Oh, yes. They could pay any wages with the approval of the Contracting Officer,—any base wages within the limits of the schedules set forth in 2390.

Q. But if they exceeded the schedules in 2390, they had to have the approval of the Wage Administrative Agency?

A. Yes, and if they deviated from the policies set forth in 2390 they would still have to seek approval.

Mr. Graham: If their policies in 2390 were in excess of what their past practice had been, would they still require approval?

The Witness: No. Since 2390 was issued as a uniform approval of all of those who could accept them.

Mr. Graham: Was your statement that that was approved by the Wage Administration Agency?

A. (No answer.)

Mr. Flood: Are you through?

Mr. Graham: Yes; thank you.

Q. (By Mr. Flood): Then the data that you took back with you to Philadelphia from Washington in the [490] submission to Dr. Abersold,—was he Dr. Abersold? A. That is right, he was.

Q. (Continuing): —was for the purpose of securing approval of the Wage Stabilization Act of the wage schedules of the Defendant contractors here,—under the Wage Stabilization Act?

The Witness: May I hear the question?

(The last question was repeated aloud as follows:

(Testimony of John Irvine Noble.)

“Question (By Mr. Flood): Then the data that you took back with you to Philadelphia from Washington in the submission to Dr. Abersold was for the purpose of securing approval of the Wage Stabilization Act of the wage schedules of the Defendant contractors here,—under the Wage Stabilization Act?”)

A. Yes.

Q. The reason that you had a problem was that there had been schedules established by some of the defendant contractors, including the G. F. Atkinson Company, that had not obtained the necessary approval, and if they had not been approved, you as Contracting Officer could not approve them for reimbursement, isn't that right? [491]

A. No. The reason we had a problem was that we were undertaking a project that was not contemplated by Circular Letter 2390. That was built around operations,—cost-plus-a-fixed-fee operations in the Continental United States that operated for the most part during the war on a 48-hour schedule work week. We could not move out in the Aleutian Islands and operate under those schedules when we were required to operate the job on an actual 70-hour work week.

Q. You couldn't recruit enough satisfactory non-manual employees unless there had been some change, is that it? A. That is correct, yes.

Q. And your problem was that of obtaining and holding and retaining satisfactory non-manual employees? A. That is correct.

(Testimony of John Irvine Noble.)

Q. Whom you classified as supervisory and semi-supervisory employees?

A. No. We just classified them as time-checkers, payroll clerks, superintendents, assistant superintendents.

Q. And in order to obtain for them an increased wage schedule, you had to obtain approval under the Wage Stabilization Act of the Wage Administration Agency?

A. In order to achieve an equitable gross pay, we had to [492] obtain approval of the War Department Wage Administrative Agency on base pay schedules that were in excess of anything we had had before.

Q. To put it simply, then, you couldn't get the increases you needed for them without getting approval you needed under the Wage Stabilization Act? A. That is correct.

Q. Up to that time had there been any payrolls of any of the defendant companies, including notably the G. F. Atkinson Company and the BMK, where you had either withheld payments subject to getting such approval or where you notified any of the defendant companies that you would have to withhold reimbursement unless you got such approval?

A. There were many instances of withholding immediate reimbursement of payments on a payroll for a great many different causes. I don't believe that I was ever aware, in the period between November 1, 1943 and April of 1944, that there were any temporary or permanent stoppages of

(Testimony of John Irvine Noble.)

payroll reimbursement on that particular account.

Q. Did you raise that as a question that had to be solved before you could reimburse?

A. Yes. I raised that as a question that would have to be solved before final clearance of such reimbursements [493] as had been made would be accomplished.

Q. As a matter of fact, you were not authorized to pass or approve for reimbursement such payrolls if they had not obtained the approval called for under the terms of 9250, were you?

A. Yes, that is correct.

Q. And the purpose of complying with 9250 was to insure that you could pass them for reimbursement?

A. The purpose of complying with 9250 was to get the job done.

Q. That was the over-all purpose, of course?

A. Yes.

Q. You were really out to win the war, but in doing so you wanted to see that 9250 was complied with so that you could reimburse the contractors who had already spent their own money, is that right?

A. Yes, because otherwise they couldn't proceed with the work.

Q. If they couldn't get reimbursement, they couldn't continue with the job?

A. That is very true.

Q. In connection with this whole submission to Dr. Abersold and in connection with Dr. Abersold's resulting directive, there wasn't one thing in the

(Testimony of John Irvine Noble.)

submission or in the directive that related to the Fair Labor [494] Standards Act, was there?

A. None.

Q. None of these companies defendant here, including the G. F. Atkinson Company and the BMK, ever asked you in writing to investigate and inform them whether the Fair Labor Standards Act applied or not, did they? A. No.

Q. And you never made any such investigation, did you? A. No.

Q. You are an engineer, no doubt?

A. Yes.

Q. By profession and experience?

A. Yes.

Q. You haven't practiced a great deal of law, have you? A. None.

The Court: At this point those connected with the case are excused until 2:00 o'clock.

(At 12:15 o'clock p.m., Friday, December 12th, 1947, proceedings recessed until 2:00 p.m., in the United States Court House.) [495]

Seattle, Washington

December 12, 1947, 2:00 p.m.

The Court: You may proceed.

Mr. Paul: May I interrupt the testimony of the witness to file with the Court excerpts from the Congressional Record which are made reference to in the interpretative bulletin by the Administrator on the Portal-to-Portal Act in the good-faith sec-

tion on which the Administrator expresses his opinions noted in the interpretive bulletin.

I also have the original Congressional Record containing every page of congressional debate on the Portal Act, from the beginning to the end.

It is in the nature of a brief—a supplement to our brief and, of course, the congressional record is something of which the Court may take judicial notice.

The Court: Is there any objection?

Mr. Graham: I should like to have the specification as to each date and volume number of the Congressional Record which is offered.

Mr. Paul: I have another compilation of it and I can give you a date reference to it. [496]

Mr. Graham: That will be sufficient, as I do not want complete copies of the record.

Mr. Flood: Is Mr. Paul offering this in the nature of a brief for the record and has he served copies on all counsel?

Mr. Paul: That is exactly what it is. I am not serving copies of the Congressional Record—that is in the Public Library—but I am serving typewritten copies on all counsel. The folder shows the pages and dates appearing in the Congressional Record.

Whether it is a part of the memorandum or not,—I can say that it is.

The Court: Those documents may be filed.

JOHN IRVINE NOBLE

(Resumed)

Cross Examination—(Continuing)

Mr. Flood: If the witness may be shown Exhibit 13, please.

By Mr. Flood:

Q. My paging is not identical with your exhibit, Mr. Noble, but will you be able to turn to Appendix "E" Article 8, Paragraph D? [497] A. Yes.

Q. It states, "Group B employees will be expected to work any reasonable number of hours during the first six days worked in the regularly established work week without payment other than the base compensation." You are familiar with that, are you not? A. Yes.

Q. Were you during the course of the work week up on the jobsite from time to time?

A. Once during the course of these contracts.

Q. In the Aleutians? A. Yes.

Q. During the course of the progress of the construction called for in Contract 202 and in Contract 7100, did the practice of requiring Group B employees to work any reasonable number of hours during the first six days worked in the regularly established work week without payment other than base compensation prevail? A. Yes.

Q. Nothing in any of the Exhibits 14 to 67 ever induced you to vary that provision, did it?

A. No.

Q. Everything that the contractor did or submitted to you for approval and anything with respect to which you gave any instructions to the

(Testimony of John Irvine Noble.)

contractor, with respect [498] to the amount of time worked for a reasonable number of hours during the first six days worked in the regularly established work week, without payment other than base compensation, was done both by you and the contractor in pursuance to that provision in the contract, was it not,—nothing else was ever substituted for it, was it? A. To the last, no.

Q. And you never authorized the contractor to depart from it, did you? A. No.

Q. During the life and progress of the construction on Contracts 7100 and 202, you were never called on, were you, to investigate or determine the particular tasks or duties performed by any of the plaintiffs in this case,—not to be performed, but actually performed, I mean?

A. Was I ever called upon to?

Q. Yes? A. No.

Q. You never made a report of the duties actually performed or the tasks actually performed by any one of the plaintiffs in this case to any superior officer of yours, did you?

A. Well, within what period of time? [499]

Q. During the life of the contract, while the work was in progress—strike “during the life of the contract”—while the work was in progress?

A. Yes.

Q. Did you make such a report orally or in writing? A. In writing.

Q. To whom?

A. To the Office of the Chief of Engineers.

Q. Do you have it available?

(Testimony of John Irvine Noble.)

A. I don't know whether it is in these exhibits or not.

Q. Can you find out?

A. Well, do we have that litigation report on the Lassiter case in these exhibits?

Mr. Flood: I will pause for an answer to that.

The Court: Any counsel present or any person present may make answer to the witness' question, if the person answering has the knowledge.

Mr. Paul: I am quite sure it is not a part of the exhibits.

Mr. Graham: No, it is not.

Q. (By Mr. Flood): My question is whether it is available?

A. We got that from Mr. Pellegrini; during the trial before Judge Black, I believe. That was a report that was made up in the spring of 1945. [500]

Mr. Graham: May I inquire off the record, your Honor?

The Court: You may be off the record.

Mr. Flood: Just one or two more questions with relation to it.

Q. (By Mr. Flood): Does it relate exclusively to the Lassiter or any other plaintiffs in this case?

A. Exclusively to the Lassiter case.

Q. Did you make any such report with respect to any of the other plaintiffs in this case?

A. Not during the progress of the work.

Q. Was the Lassiter report made during the progress of Lassiter's employment?

A. I believe so—during the progress of the em-

(Testimony of John Irvine Noble.)

ployment of most of the plaintiffs; I am not sure if Lassiter was still there or not.

Q. You don't recall the date when you prepared the report, do you—or do you?

A. Well, yes; it was prepared in the spring of 1945 or the—

Mr. Flood: May Mr. Paul be excused to call his office in regard to that, your Honor?

The Court: Yes.

Mr. Flood: I will postpone any examination with [501] relation to it until he returns.

The Court: It is agreed that you represent his clients while he is away?

Mr. Flood: I will be glad to unless he disallows it afterwards, and I don't think that he will.

Q. (By Mr. Flood): This investigation that you made with respect to Lassiter's employment was an investigation you made after the tasks and duties had ceased, was it not?

A. Well, of course, they were Seattle office employees. They continued to perform their duties on this particular operation until—oh, the end of 1945.

Q. Did you make any such investigation for any of the employees of the BMK Company while the employees were engaged in work for the company?

A. No. The BMK claims, I believe, all developed from jobsite employees after they had returned from the operations.

Q. Then your answer "no" stands without qualification? A. Yes.

Q. You never discussed the coverage of the Fair

(Testimony of John Irvine Noble.)

Labor Standards Act over these contracts here in litigation with any officials of the Wages and Hours Division under the Fair Labor Standards Act during the progress of [502] the work on the contract, did you?

Mr. Graham: If your Honor please, I would like to object to the question. I don't believe it is material to any issue here as to testing the good faith of the defendant or the defendant companies. What this witness may have done in competition with others is not material that I see.

The Court: Does it have any bearing on the others' good faith, the other parties or representatives of the parties? Does it have any bearing on the good faith of the others who are supposed to be talking—the good faith of the other representative defendants involved?

I will put it this way then: May I ask that Counsel ask him the question? For what purpose do you see this information indicated by your question?

Mr. Flood: I would prefer not to disclose that until the witness answered the question. That is one of the reasons I am asking it but I will call your Honor's attention to the memorandum brief and refer you to the case that I had in mind.

The Court: Will you do that please? Can you state it in this way—on what issue does the question have a bearing?

Mr. Flood: It is probably much better stated [503] in the language of a court than in any am-

(Testimony of John Irvine Noble.)

ateur statement I could make, so I will refer your Honor to page 9 of Miss Krug's brief, the Karew vs. Emerson case quoted therein.

Mr. Graham: If your Honor please, I am familiar with the—

The Court: I believe I will ask Counsel to state what issue in the case he thinks it has a bearing on. Otherwise, I will rule without the assistance of that information which I expect Counsel to give me.

Mr. Flood: Before I insist, if I do insist upon an answer to this question, I will ask another question. However, I would like the reporter to read the present question.

(Last question repeated aloud by the reporter.)

Mr. Flood: I will revise the question and ask it in another way.

Q. (By Mr. Flood): You never were advised by any of the defendant companies to obtain a ruling from any of the officials of the Wages and Hours Division with respect to the coverage of the Fair Labor Standards Act over any of these contracts in litigation, were you? [504]

A. I was asked by the defendant company—

The Court: I think you ought to say yes or no to that question, and then, if you wish to explain it in some way, that is another matter.

Mr. Flood: I was about to make the same request. I don't mean "advised" — I mean "requested."

(Testimony of John Irvine Noble.)

The Witness: Now, how does the question read?

(The last question was read aloud by the reporter as follows:

“Question. (By Mr. Flood): You never were requested by any of the defendant companies to obtain a ruling from any of the officials of the Wages and Hours Division with respect to the coverage of the Fair Labor Standards Act over any of these contracts in litigation, were you?”)

A. No.

Mr. Flood: No other questions except with the reservation of the privilege to ask questions if Mr. Paul—

The Court: Very well. Any redirect examination? [505]

Mr. Graham: Yes, your Honor.

Mr. Flood: Your Honor, I ask leave to ask one more question and I ask that the witness pause before answering it in case his counsel wishes to interpose an objection.

The Court: You may do that.

Q. (By Mr. Flood): You never on your own motion, during the life of or progress of the work on contracts 7100 and 202 held a discussion with or conference with any official of the Wages and Hours Division with respect to the application of or coverage of the Fair Labor Standards Act to these contracts in litigation?

Mr. Graham: If your Honor please, as counsel—

(Testimony of John Irvine Noble.)

The Court: The statement should be ended by "did you", I think, in order to carry out the effect of a question.

Mr. Flood: All right.

Q. (By Mr. Flood, continuing): Did you?

Mr. Graham: We are not here testing the good faith of Mr. Noble or any other member of the War Department staff. The Court has heretofore ruled in [506] prior matters in connection with this case. We are concerned here with the question of the good faith on behalf of these contractors. Any inquiry as to what the contracting officer or the War Department did, I submit, is not material—did or did not do.

Mr. Flood: At least one more question.

The Court: That is sustained.

Q. (By Mr. Flood): The same question, Mr. Noble, with this qualification: You never did so, prior to or in connection with any of the circular letters or instructions which you as contracting officer issued in this case to the defendant companies?

Mr. Graham: I make the same objection.

The Court: Read the question.

(The last question was repeated aloud by the reporter.)

The Court: Before I finally dispose of this question which has been presented by this objection, on what other issues do counsel contend that the Court has sustained defendants' objection that the witnesses should not be required to make answer

(Testimony of John Irvine Noble.)

to a similar question because the witness' good faith is not in issue? [507]

Mr. Graham: I may say, your Honor, that there were interrogatories directed to certain officials of the War Department. The issue was present as to whether or not those were material or not material. The arguments were based in the same form as these objections and the Court observed in making its ruling that it did not believe that the inquiry sought to be obtained, an inquiry of an official of the War Department, was material. We are testing here the good faith of the contractors, if your Honor please. We are not testing the good faith of the War Department.

The Court: The Court's ruling as to each one of these objections as to each one of these questions is revised to be that the objection of defendants is overruled and the witness may make answer to each of these two last questions.

Mr. DeGarmo: May I state this additional objection for the record, if your Honor please, which I am not certain appears in Mr. Graham's objection?

The Court: You may do so.

Mr. DeGarmo: And that is that the questions are not material unless it is shown that the information which Mr. Noble obtained was brought home to the contractors, themselves. I think that was inherent [508] in his objection, but I wish to make certain that that is understood by the Court.

The Court: The objection is overruled. He may answer these last two questions.

(Testimony of John Irvine Noble.)

Mr. DeGarmo: I think I should make one further objection to this question upon the ground that it is not proper cross-examination. I recall asking Mr. Noble no question with respect to any independent research which he may have done concerning this subject matter which is now the basis of this question.

The Court: Overruled.

(The first of the last two questions was read aloud by the reporter as follows:

“Question. (By Mr. Flood): You never on your own motion, during the life of or progress of the work on Contracts 7100 and 202 held a discussion with or conference with any official of the Wages and Hours Division with respect to the application of or coverage of the Fair Labor Standards Act to these contracts in litigation, did you?”)

The Court: What is your answer, Mr. Noble?

The Witness: Your Honor, that is a very broad [509] question. Am I expected to answer yes or no?

The Court: You are expected to, if you can.

A. One says “discussions as to the coverage.” I can say definitely that I never sought a ruling from a member of the Wages and Hours Division as to the coverage of the Act on this particular contract. I did hold discussions with the representatives of the Wages and Hours Division with regard to certain requests that they made for work

(Testimony of John Irvine Noble.)

or assistance on our part in helping them with investigation or inquiry as to the contractors' methods. But I never sought a ruling.

Mr. Flood: I think that answers the question. Before I ask him to answer the second question, may I now ask another question?

The Court: No. Let that be reserved until later.

(The second of the two questions referred to was read aloud by the reporter as follows:

“Question. (By Mr. Flood): The same question, Mr. Noble, with this qualification: You never did so, did you, prior to or in connection with any of the circular letters or instructions which you as Contracting Officer issued in this [510] case to the defendant companies?”)

The Witness: Do you mean did I ever seek a ruling from the Wages and Hours Division in regard to a circular letter?

Mr. Flood: Yes, I am willing to put it that way, if you wish. A. I never did.

Q. (By Mr. Flood): You held a discussion with some representative or representatives—which was it—of the Wages and Hours office in Seattle—was it one or more?

A. I held discussions at different times with two representatives.

Q. Who were they, please?

A. I talked to Mr. Cecil in I think May of 1944 when the contractor asked me if he could make his records available to Mr. Cecil for examination.

(Testimony of John Irvine Noble.)

Q. Did you talk to Mr. Cecil direct?

A. I talked to Mr. Cecil direct.

Q. Who else did you talk to, if anyone else?

A. In I believe September of that same year, 1944, I talked to Mr. Neubert.

Q. Was that with respect to a specific complaint that had [511] been made to the company or to you?

A. No.

Q. What was it with respect to?

A. It was not with respect to coverage of the Act at all. It was with respect to an investigation that was being made by Mr. Cecil. Mr. Cecil had asked the contractor to provide labor—that is personnel—to make certain reviews and excerpts from payrolls and—

Q. And the contractor asked you if that was a reimbursable item if you provided it?

A. The contractor asked me.

Q. And you indicated that it would not be reimbursable?

A. That was the import of it, yes.

Q. That was the summary of it, was it not?

A. No.

Q. You may continue with it.

A. I handed it up to higher authority. And higher authority, after whatever procedures they went through, informed me that it was not an authorized part of the contract. It was not an authorized undertaking under the contract.

Q. If the Company wanted to do it, they would have to do it out of their own pocket and it would not be reimbursable, would it?

(Testimony of John Irvine Noble.)

A. That is right. [512]

Q. That had nothing to do at all with regard to coverage of the Fair Labor Standards Act?

A. No. That had nothing to do—

The Court: If you can repeat word for word what you stated, will you do so?

The Witness: There was no question at all of seeking a determination of coverage under the Fair Labor Standards Act.

Q. (By Mr. Flood): It wasn't involved at all in the Cecil transaction, was it? A. No.

Mr. Flood: Mr. Paul is unable to locate that so-called Lassiter letter. I don't regard it as necessary to pursue it further, then, your Honor.

If defendants have it and it is available, I will be glad to see it.

The Court: Do the defendants have that communication?

Mr. Graham: We do not, your Honor. I should say it was a document prepared by the United States Attorney's office or the War Department in conjunction and I have seen a copy of it—a copy was furnished to Counsel for plaintiffs. I have never had a copy.

Mr. Flood: I will ask this question about it, [513] —of the witness if he knows—or take the answer from Counsel.

Q. (By Mr. Flood): Was it post litem motam, that is, was it after the litigation had begun?

Mr. Graham: I can't answer that.

Mr. Flood: Do you know? (Addressing witness)

(Testimony of John Irvine Noble.)

The Witness: Let me get your question again, please. Will you state it in English?

Q. (By Mr. Flood): Was it after the litigation had been filed and commenced?

A. Yes, it was after the litigation had been filed. It was a litigation report.

Mr. Flood: It was what I called, then, post litem motam.

The Court: Do you wish to ask any questions on redirect?

Mr. Graham: Yes, your Honor, we do.

The Court: You may proceed.

Redirect Examination

By Mr. Graham:

Q. Mr. Noble, would you refer to Exhibit Number 73? A. Yes, I have it. [514]

Q. Was that attached to or a copy of that letter attached to Exhibit 76? A. Yes, it was.

Q. In other words, Exhibit 76 addressed to you by the company enclosed the letter from Mr. Neubert dated September 19th, being Exhibit 73?

A. That is correct.

Q. What did you do upon receipt of that letter, Exhibit Number 76 and the enclosure, Exhibit Number 73?

A. It was transmitted to the Office of the Chief of Engineers with a request for instructions.

Q. Will you refer to Exhibit Number 58?

A. Yes.

Q. Directing your attention to this telegram which reads:

(Testimony of John Irvine Noble.)

“Re your letter dated 22nd January 1945, Subject ‘Applicability of Fair Labor Standards Act to CPFF Contractors,’ no regulations superseding Circular 2390 have been issued. Claims of employees of CPFF contractors paid in accordance with C.L. 2390 should be investigated and reported as outlined in paragraph 750.23 orders and regulations.”

I will ask you if that was the response to your referral?

A. These exhibits don't contain the letter from the District [515] Engineer transmitting 76 to them, requesting advice.

Q. It does not contain that, as I understand it, but was this Exhibit 58 the response which was received from higher authority?

A. Well, there is no connection between the two.

Q. What were the circumstances under which you received Exhibit 58?

A. Exhibit 58 is a teletype in response to our letter—obviously in response to our letter of 22 January 1945, relative to claims of employees. The letter from the Defendant Guy F. Atkinson Company, was dated the 21st of September, 1944, transmitting Mr. Neubert's letter which was four months earlier, and transmitted, not claims from personnel, but a request from the Wage and Hour Division to lend them personnel to follow up an investigation completing Mr. Cecil's work in which he undertook to state that violations of the Act had been disclosed.

(Testimony of John Irvine Noble.)

Q. What instructions did you give the contractors in response to their referral of Mr. Neubert's letter?

Mr. Flood: It presupposed instruction in writing, your Honor. I ask that the writing be identified.

The Court: Condition it so that in this question or some other one you may find out what was [516] done.

Q. (By Mr. Graham): Did you give instructions to the Guy F. Atkinson Company following referral to you of Mr. Neubert's letter?

A. As I remember it, I told the contractors—I probably gave them oral instructions that I had referred their inquiry to higher authority and asked for instructions from them and that they were to refrain from taking any further action until those instructions had been received; and I believe it was quite some time later—probably a couple of months later—that instructions finally were forthcoming from the War Department to the effect that no such work was authorized under the contract.

Q. Will you refer to Exhibit 59? A. Yes.

Q. Directing your attention to the second paragraph thereof which reads "In response to our inquiry the Office of the Chief of Engineers—(reading)—cost-plus-a-fixed-fee contractors. In view of these instructions, claims based on alleged violations of the Fair Labor Standards Act shall continue to be denied by the Contracting Officer."

(Testimony of John Irvine Noble.)

And I will ask you were any other instructions given in writing to the contractor, [517] if you know, with reference to this subject matter?

The Witness: May I review this a moment?

The Court: You may.

The Witness: May I have the question again?

Mr. Graham: I will rephrase the question.

Q. (By Mr. Graham): Following the quotation and directing your attention to Exhibit 59, reading the second paragraph thereof, can you state whether or not any instructions at variance with this quoted paragraph were ever given to the contractors?

Mr. Flood: Your Honor, we are entitled to facts, and the Court can draw inferences.

To call upon this witness to describe what may be at variance with some other unnamed instruction, I object on the ground it is vague and may mean one thing to the witness and something else to me and a third thing to the Court.

The Court: Sustained.

Q. (By Mr. Graham): Were any other instructions given, Mr. Noble?

A. There had been instructions issued to the contractors,—oh, from the early days of the contract, and even in the older contracts, back to 1941 or '42 with regard [518] to what was expected of them in the case of claims of employees. We had claims of all sorts—lost tools, overtime work that was not credited, and many, many claims that did not involve the Fair Labor Standards Act. The

(Testimony of John Irvine Noble.)

general instructions covered the processes or procedures of reporting claims of all kinds. And there were undoubtedly several others. This letter of 8 December 1944 that is referred to in the third paragraph; I cannot tell now whether or not that specifically mentioned Fair Labor Standards Act claims or just was a general instruction on the handling of claims.

Q. Would you refer to Exhibit 21, Mr. Noble?

A. Yes.

Q. Is that one of the letters of prior instructions to which you referred?

A. Well, not exactly. This is more a problem that the contractor has in seeking previous or beforehand advice as to procedures. I was referring more to letters of instructions in detail to the contractor from the Contracting Officer, referring to the requirement of the contract that the contractor immediately report to the Contracting Officer all instances of claims by employees.

Q. Of any nature? [519]

A. Yes. Those procedures are set forth in O&R, of which I have furnished plaintiffs' counsel a copy,—specifically Mr. Paul—and it was just a reiteration,—our letters and advice to the contractors were just reiterations of our instructions from O&R.

Q. With reference to the Abersold submission, being Exhibit Number 42, as I recall your testimony before the recess, you indicated that the objective of such was to secure approval under Executive Order 9250.

(Testimony of John Irvine Noble.)

Mr. Flood: Your Honor, I think Counsel should propound questions.

The Court: The objection is sustained.

Q. (By Mr. Graham): I will ask you, Mr. Noble, whether or not you were equally concerned with compliance by the contractors with Executive Orders 9240 and 9250, Circular Letters 2236 and 2390, the Copeland Act, the 8-hour law, and any other law or regulation which would be applicable to and have bearing upon the performance of these contracts? A. Yes.

Q. Directing your attention to Exhibit Number 22, and to Exhibit 25, I will ask you what relationship there was between the rates submitted and approved in these two exhibits and those contained in the Abersold submission, [620] Exhibit 42.

A. Exhibit 22 is the initial submission of Guy F. Atkinson Company to the Contracting Officer for approval of a preliminary,—or a wage schedule. And as stated, these were wage schedules already approved on previous work in Alaska.

Exhibit 25 is the approval of such wage schedules.

The Court: By whom?

The Witness: By George F. Tait, Contracting Officer.

Q. (By Mr. Graham): Where were the employees employed or where did they work that are covered by these two exhibits?

A. This is exclusively the field organization schedule.

Q. Where was that? A. For Adak.

(Testimony of John Irvine Noble.)

Q. That is the islands in the Aleutians?

A. For Adak, at the time.

The Court: Did you ever state that the War Department authorities determined the question of wages and overtime compensation?

The Witness: I believe I have.

The Court: In making that statement, did you [521] have in mind at the time any particular written clause of any construction contract to which the defendants were a party?

The Witness: Your Honor, the contracts incorporated the words or the policies expressed in Circular Letter 2236 insofar as the field work was concerned, the policies set forth by the War Department in 2236. And as the instruction of the War Department they were incorporated in the contract in the form of the provisions of the individual employment contract which appears as Appendix E of the prime contract.

The Court: Do you contend that such Appendix E—being Circular Letter Number 2236, is that what you have just said—

The Witness: Yes.

The Court: —makes, itself, any such statement as that,—that the War Department shall determine price policies or questions of wages and overtime compensation?

The Witness: No. Appendix E is the employment contract prescribed by the War Department to be entered into by the employer and the employee, and that has those policies in it.

(Testimony of John Irvine Noble.)

The Court: What I am trying to reach at this moment is some written language which you contend is [522] a part of Contracts 7100 and/or 202 which takes these wages and overtime coverage questions outside of the coverage of the contract. Will you point out any exhibit that has that effect?

The Witness: Exhibit 13, the basic contract, 202.

The Court: That is called the prime contract, is it not?

The Witness: The prime contract. In Article X, sub-paragraph 1 (d), it states:

“Conditions of employment, rates of pay for overtime and holidays will be as set forth in the employment agreements attached hereto and made a part hereof.”

The Court: Is that all of the quotation there?

The Witness: I believe that is all that refers—although—

The Court: I want to get some specific references down here. As I recall, you said this quoted language could be found in Article X, sub-paragraph 1 (d) of Defendants' Exhibit 13.

The Witness: The basic contract, yes.

The Court: What else have you to say as to where there is language within that contract which you [523] claim bears out your former statement that you believe the War Department had control over these subjects—the rates of pay for overtime and holidays?

The Witness: You are not concerned with the

(Testimony of John Irvine Noble.)

actual wording of that appendix, are you, Your Honor?

The Court: I am not at this moment. I am trying to find some language that you contend bears out your contention that it is the War Department that has the final say about the matter of rates of pay for overtime; the language in the contracts is what I wish you to point out, which supports your contention on the question.

The Witness: What I just read to you, of course, refers to the stipulated contract and that in itself provides for the overtime as has been discussed here,—the overtime calculation.

Now, I believe I can show you—

The Court: Referring to this quoted language, as follows:

“Conditions of employment, rates of pay for overtime and holidays will be as set forth in the employment agreements attached hereto and made a part hereof,”

—read the language that does so.

The Witness: In the employment agreement?

The Court: Yes.

The Witness: Yes.

“The employment agreement for non-manual employees is Appendix E, attached to and made a part of the contract.”

The Court: What is Appendix E? Is it ever referred to by any other identifying mark?

The Witness: Well, it has quite an elaborate heading, your Honor.

(Testimony of John Irvine Noble.)

The Court: In these proceedings have counsel referred to it by any other name?

The Witness: The non-manual employment contract.

Mr. Flood: Exhibit 13, Article 8,—will you give the rest of it?

The Witness: I will get to that but I think he is interested in the document, itself.

The Court: What kind of a document is Appendix E?

The Witness: The title of it is “Cost Plus-a-Fixed-Fee Contractors’ Uniform Contract of Employment Applying to Employees of Fixed Fee Contractors Employed in the Continental United States or in Alaska for Work in Alaska.”

The Court: Point out some language, if there [525] is any written, which you contend supports your contention about what authority controls the matter of rate of overtime pay for non-manual employees respecting Contracts 7100 and 202?

The Witness: In this employment contract, Appendix E, Article 8. The entire article deals with rates and specifically paragraph “b” of Article 8.

The Court: Paragraph “b”?

The Witness: “b.”

The Court: Give me the first dozen words of it slowly.

The Witness: “Non-manual employees will be divided into the following groups.”

The Court: Give me the first words that say anything about rates of pay for overtime, will you?

(Testimony of John Irvine Noble.)

The Witness: Yes. That paragraph "b," your Honor, just identifies the groups. Then paragraph "d"—small "d"—

The Court: You have something left out, do you not, before you go to the next paragraph?

The Witness: Yes. Then it goes on to describe Group A and Group B.

The Court: Let me have your permission to indicate in my notes something that is left out that is [526] not important until you get to the place that it appears. Now, what place is that?

The Witness: That is paragraph d. that says Group "B",—in quotation marks.

The Court: All right.

The Witness: "—employees will be expected to work any reasonable number of hours during the first six days worked in the regularly established work week without payment other than the base compensation. They will be paid at two times the straight time hourly rate for all authorized work performed on the seventh consecutive day the employee works in any regularly established work week."

The Court: Is there any other language?

The Witness: This sets forth what is going to happen to Group "A", Group "C", and Group "D", and so forth. I don't think that is pertinent.

The Court: Is there any other language in the contract that has anything to do with authorizing the War Department as distinguished from the officials under the FLSA in determining rates of overtime?

(Testimony of John Irvine Noble.)

Mr. Graham: May I direct your attention, Mr. Noble, to paragraph (e) of Article X, Section 1?

The Witness: This is in the prime contract?

Mr. Graham: That is right. [527]

The Court: Article X, Section 1.

The Witness: Do you mean Article 2?

Mr. Graham: Article X, Section 1.

The Witness: “(e)”.

Mr. Graham: Sub-paragraph small (e) in parenthesis.

The Witness: “It is contemplated that work at the site will be carried out on the basis of two 10-hour shifts a day, 7 days a week.” Is that pertinent, your Honor?

The Court: It doesn't seem so vital to me. But you may proceed.

Is there any other language in the contracts or parts of contracts 7100 or 202 that support your contention that the War Department as distinguished from the authorities operating under the FLSA shall determine the matter of rates of pay for overtime?

The Witness: In Article II, paragraph 1 h,—I believe I had better read this to you. It is very long and possibly you will later want to pick out parts of it.

The Court: All right.

The Witness: “Salaries of job managers, superintendents, timekeepers, foremen, and other field employees of the Contractor in connection with the work. In case [528] the full time of any field em-

(Testimony of John Irvine Noble.)

ployee of the Contractor is not applied to the work, his salary shall be included in this item only in proportion to the actual time applied thereto. No person shall be assigned to service by the Contractor as superintendent of construction, chief engineer, chief purchasing agent, chief accountant, or similar position in the Contractor's field organization, or as principal assistant to any such person, until there has been submitted to and approved by the Contracting Officer a statement of the qualifications, experience, and salary of the person proposed for such assignment. The payment of any excess salary over such scheduled amounts shown in the approved salary schedule, Appendix "C" attached hereto and made a part hereof, shall not be reimbursable, unless and until the Contracting Officer has so approved in writing."

The Court: That is sufficient. Is there anything else to support your statement or contention that the War Department, under FLSA, is concerned with and determines the problems as to rates of overtime?

Mr. Graham: May I state for the convenience of the Court,—the exhibit references which Mr. Noble has indicated in the prime contract are set forth in memorandum form for the convenience of the Court in reference to the various items in the prime contract [529] which would be of assistance.

The Court: The Court is anxious to find out what the witness knows about it. I gathered from previous testimony that this witness was working for the War Department as a contracting officer.

(Testimony of John Irvine Noble.)

Mr. Graham: That is correct, sir.

The Court: I thought that he might have the point of view at least of the War Department in this matter as to who had the authority to consider and determine problems of this nature that we have been discussing. [530]

The Witness: Well, I think that is the extent of the—

The Court: You can't think of anything else?

The Witness: Nothing contained in the contract.

The Court: Did you know about the Fair Labor Standards Act during this time?

The Witness: I knew about it, yes.

The Court: Did you know that it claimed to have authority to determine all questions relating to rates of pay,—as to wages and overtime wages and holidays?

The Witness: No, I did not.

The Court: You didn't know that?

The Witness: No,—not all questions.

The Court: Did you ever hear of anybody in authority, operating and functioning under that act, as so contending?

The Witness: Not until 1944.

The Court: Did anybody purporting to speak for the Administration authorities under the FLSA suggest to you in any form of words that that organization was not having anything to do with these war contracts in Alaska respecting wages and rates of overtime pay for non-manuals?

The Witness: No one in the Department of

(Testimony of John Irvine Noble.)

Labor [531] or the Wage and Hours branch had ever said anything to me about it.

Your Honor, may I point out that the Office of the Chief of Engineers had its headquarters in Washington, D. C., with a very large staff,—presumably the most expert that they can obtain—

Mr. Flood: Just a moment, if your Honor please. I don't want to be at all discourteous but I don't think we ought to have the presumptions about expertness. There are a lot of degrees about expertness.

The Court: Just leave out comment on the various capacities of one kind and another. You may continue your statement.

The Witness: That is the headquarters office of the Corps of Engineers. They have branches of specialists—

The Court: Try to proceed and make your statement responsive to the Court's question.

The Witness: Well, the legal branch and the labor relations branch. They are the ones who are looked to to coordinate with the Wage and Hours Division of the Department of Labor and other branches of the Government.

The Court: With what result did you look to them so far as it affected the questions here involved? [532]

The Witness: That when the Chief of Engineers issues a Directive to a District Engineer saying "2236 and 2390 shall be incorporated in your contracts henceforward," it is our assumption,—it is certainly not my place to go back of the provisions

(Testimony of John Irvine Noble.)

and ask: "Are these legal?" It is the assumption that they have cleared all of that ground and have taken any necessary steps to correlate with the departments of the Government.

The Court: Did any official agency in the Corps of Engineers of the United States Army ever say anything that you believe amounted to that in respect to these contracts for construction in Alaska?

The Witness: That amounted to the fact that they had covered all of the angles?

The Court: That you were to see to it that those documents you have just mentioned were part of those contracts and that the parties to the contracts were to comply with those regulations?

The Witness: The Chief of Engineers directed that we do that,—that we incorporate the provisions in the contract and see that they were complied with.

The Court: At this time we will take a 10-minute recess.

(Short recess.) [533]

The Court: You may proceed.

Mr. DeGarmo: If your Honor please, with all deference to your Honor, in order that the record on the case may be preserved,—we did not wish to interrupt your Honor's line of questioning, but we wish at this time to object to any portion of the questions by the Court which had to do with the good faith, or which might be construed as having to do with the good faith of the War Department in the Directives, Orders, or Regulations which they issued and some of which were thought that they

(Testimony of John Irvine Noble.)

might not have been brought home to the witnesses, and wish to move to strike anything of that nature which was not brought home to the defendants.

The Court: The objection will be overruled. The Court is finished with that line of inquiry now, though.

You may proceed with your next question.

Q. (By Mr. Graham): Referring to these exhibits, 26 and 27, Mr. Noble, are those the counterparts of Exhibits 22 and 25 relating to the Seattle office employees of the contractor?

A. 26 is the submission for approval of the schedule covering Seattle headquarters office employees, submitted [534] 15th November. On 30th November the Contracting Officer advised the contractor by letter that the submission was approved with minor exceptions.

Q. Can you state whether or not the salary payments by the company prior to the effectuation of the Abersold Directive in May of '44 were or were not in accordance with these approvals?

A. To the best of my knowledge they were strictly in accordance with these approvals.

Mr. Graham: I have no further questions, your Honor.

The Court: "These approvals,"—what approvals do you mean by "these"?

The Witness: These initial submissions that were based on wage rates that had been effective on previous contracts.

The Court: As evidenced by what exhibits, if any?

(Testimony of John Irvine Noble.)

The Witness: Exhibits 22 and 26.

Q. (By Mr. Graham): Are not the Contracting Officers letters exhibits 25 and 27?

A. Those were the approvals, yes, sir.

The Court: What exhibits, then,—I would like to know, as I would like to make a reference to what [535] exhibits are involved?

The Witness: Exhibits 22 and 26 were the submissions of the schedules.

The Court: And what if any other exhibits?

The Witness: 25 and 27 were the approvals of the Contracting Officer.

The Court: You may proceed.

Mr. Graham: I have no further questions.

Recross Examination

By Mr. Flood:

Q. These approvals, Mr. Noble, that you just spoke about were of initial wage rates, did you say?

A. On Contract 202,—pardon.

Q. Did you say of initial wage schedules?

A. That is correct, for Contract 202.

Q. Were they all consistent with Executive Order 9250?

A. They were the same as had been in effect on previous contracts as of October 2, 1942 when 9250 went into effect; therefore, there was no modification, no increase or decrease within the meaning of 9250. The company incorporated these schedules but these were the ones, as has been shown, not suitable to our new undertaking.

Q. They were then in conformity with 9250?

A. As far as we knew, they were.

(Testimony of John Irvine Noble.)

Q. And 9250 was the Executive Order issued by the Director of Wage Stabilization or issued by the President—

A. Issued by the President.

Q. —under the Wage Stabilization Act, freezing wage schedules in effect on October 2, 1942?

A. Yes.

Q. And the Abersold Directive was then a procedure by which you got approval for increasing those wage schedules as you needed them increased in the Aleutians and in the Seattle office?

A. Yes. It increased the wage ranges as required, and it also added new classifications in some instances, which was also necessarily approved.

Q. There was not a single writing of any kind or character, was there, Mr. Noble, which authorized you or the War Department to pass upon the question of whether the Fair Labor Standards Act covered or applied to the project or not, was there?

A. None that I knew of.

Mr. Flood: No further questions.

The Court: Anything further of this witness?

Mr. DeGarmo: I think not, if your Honor please.

The Court: The Witness is excused. [537]

WALTER T. NEUBERT,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Will you state your name, please?

A. Walter T. Neubert; 4127 Easton Avenue, Seattle.

Q. By what organization or agency are you employed?

A. United States Department of Labor, Wage and Hours, Public Contracts Divisions.

Q. Where is your office located?

A. 407 Federal Office Building, First and Marion.

Q. How long has it been located at that particular location? A. Since January 1 of this year.

Q. Prior to that where was your office located?

A. Room 305, Post Office Building.

Q. During the years 1943, 1944, and 1945, did you hold the same position which you now hold?

A. Yes, sir.

Q. What is your present position with the Wage and Hour Division?

A. Supervising inspector in charge of this area.

The Court: As of what time were you then speaking?

The Witness: I have been supervising inspector since 1941.

Q. (By Mr. DeGarmo): Over what geographi-

(Testimony of Walter T. Neubert.)

cal territory does your authority extend at the present time, Mr. Neubert?

A. The State of Washington.

Q. Was that authority the same during the years 1943, '44 and '45? A. No.

Q. For what geographical area did you have authority during each of those years?

A. I can't give you the exact date but early in the spring of 1943 it was changed. Up until 1943 in the spring, some time in March or April, I think in April, the Alaska territory was made a separate unit to report directly to Washington, D. C.

The Court: Was that in 1943, you say?

The Witness: About April, 1943, your Honor. Prior to that time my territory consisted of Washington, Northern Idaho, and Alaska.

Q. (By Mr. DeGarmo): Mr. Neubert, are you acquainted with [539] one Leonard Cecil?

A. He was an employee of our office, yes.

Q. During the years 1944 and '45?

A. Yes, sir.

Q. Is he still in the employ of your office?

A. He is not.

Q. What were his particular duties or his particular office with the Wage and Hour Division in 1944? A. He was a field inspector.

Q. Mr. Neubert, what is the fact as to whether you have authority to issue opinions and/or interpretations of the Fair Labor Standards Act?

Mr. Flood: Your Honor, this is not the best evidence of authority. Declaration of an agent doesn't prove agency and a declaration of the witness would

(Testimony of Walter T. Neubert.)

not prove his authority. The best authority is that authority which stems from some law or regulation that stems from a law and that alone would be competent evidence to establish authority.

The Court: Does either side wish to present any authority supporting its present respective position?

Mr. Flood: I am not prepared to brief that but I stand on it as axiomatic law.

Mr. DeGarmo: I believe this man should be [540] permitted to state what he understood his authority to be.

Mr. Flood: I think he can testify what he did and in some circumstances that may be something from which authority actual or apparent may be concerned. But his own declaration of authority is not sufficient evidence thereof.

The Court: Read the question.

(Last question repeated by the reporter.)

The Court: The objection is sustained without prejudice to inquire in other cases as to what his practice was or what he did.

Q. (By Mr DeGarmo): Mr. Neubert, in the administration of your office during the years 1943, 1944, and 1945, what is the fact as to whether you did or did not issue any opinions concerning the applicability of the Fair Labor Standards Act to an employer or employee?

A. With the court's permission, I would like to have the question clarified in this respect—

Mr. Flood: Then I am going to object to the

(Testimony of Walter T. Neubert.)

question, your Honor, on the ground that even though there is a disjunctive thrown in, it is a leading question and predicates a conclusion which it evidently [541] calls upon this witness to answer and I think he should propound a question on direct examination that calls for an ultimate fact and that can be done without being predicated on a suggested conclusion.

The Court: The objection is overruled. The witness is permitted to advise as to what it is he doesn't understand.

The Witness: Your Honor, I don't understand whether it is meant—

Mr. Flood: I object further on the ground, your Honor, that it assumes as a fact that the witness issued certain opinions and I think that substance renders the question bad.

The Court: Overruled.

The Witness: Your Honor, I don't understand whether the question means, did I make opinions myself or did I pass on opinions which I had handed to me.

Q. (By Mr. DeGarmo): I am referring to whether you initiated such opinions.

A. No. I have no authority to initiate opinions. I have to pass them on.

Mr. Flood: I move that everything after the word "no," your Honor, be stricken as being incompetent, irrelevant and immaterial. [542]

The Court: Overruled. The request is denied.

Q. (By Mr. DeGarmo): In the event that a question comes in to your office, Mr. Neubert, as to

(Testimony of Walter T. Neubert.)

the question of the application of the Fair Labor Standards Act to an employer or an employee, what do you do to secure a ruling? [543]

* * * *

A. In the event that the particular situation has come before the knowledge of the Administrator before this time, we will have a ruling on a similar situation which I can pass on; and that is the manner in which we issue our interpretations, is that and the administrative bulletin issued by the Administrator as his opinion. We have to pass on his opinion and not make our own.

Q. (By Mr. DeGarmo): Who is the person in the Department of Labor who does issue opinions and interpretations concerning the Fair Labor Standards Act?

A. The Administrator does with the assistance of the Solicitor of the United States Department of Labor.

The Court: It isn't clear,—the Administrator of what?

The Witness: The Administrator of the Fair Labor Standards Act.

The Court: And, of course, you should fix the time as of when these facts are inquired of. [545]

Q. (By Mr. DeGarmo): Do your answers relate to the year 1944? A. Yes, sir.

Q. Do they also relate to the present time?

A. Yes, sir.

Mr. Flood: I object to the question and ask that the answer be stricken. I am sorry I was a little late in objecting,—and I object upon the ground

(Testimony of Walter T. Neubert.)

that the question calls for a conclusion of law. The statute lays down the authority of the Administrator and his authority to issue regulations and his authority to delegate and those are all matters of law as to which the conclusion of this witness is not the best evidence.

Mr. DeGarmo: My question was who actually does it,—not who has authority to do it.

The Court: The objection is overruled and the request denied.

Q. (By Mr. DeGarmo): Mr. Neubert, did Mr. Cecil work under your supervision and direction?

A. He did.

Q. What is the fact as to whether Mr. Cecil, as a field inspector, had authority to issue an opinion as to whether an employer or employee was covered by the [546] Fair Labor Standards Act?

A. He had no authority to issue opinions. He was a man gathering facts in the field.

Q. Is the question, Mr. Neubert, of whether a particular employer or employee is covered by the Fair Labor Standards Act one which you consider a question of interpretation or opinion?

Mr. Flood: That is objected to, your Honor, as being incompetent, irrelevant, and immaterial. His opinion upon the matter is not within the issues here and is not the best evidence and could not vary the legal obligation of all of the parties involved in any event. It calls upon this witness to pass upon a question of law.

Mr. DeGarmo: I do not believe that that is the effect of the question, if your Honor please. He has

(Testimony of Walter T. Neubert.)

stated that he does not have authority to express opinions or interpretations. I am now attempting to find out whether this particular phase is what he considers as an interpretation or opinion. I think that is material to a showing that the particular issue which we are concerned in was not one upon which he had authority to express opinion.

Mr. Flood: His opinion is incompetent, irrelevant and immaterial. [547]

Mr. DeGarmo: Certainly he is the person in the best position to know that because he is the one in this district charged with the administration of this Act as far as that portion of it is concerned.

The Court: Mr. DeGarmo, couldn't the subject be gotten at by asking what it is that he did with reference to what you have in mind?

Mr. DeGarmo: I think perhaps the matter is covered in previous questions. I will withdraw the question.

You may examine the witness.

Cross Examination

By Mr. Paul:

Q. If an employee is employed in California, but whose payroll records are maintained by a company here in Seattle, would you inspect the wages of such employee or would you not?

A. The company having an office here in Seattle?

Q. Yes,—with the payrolls of that employee in Seattle.

A. We would inspect the payroll records in this area.

(Testimony of Walter T. Neubert.)

Q. I didn't understand.

A. We would inspect all of the payroll records which they had in this area, yes.

Q. That would likewise be true of all employees employed [548] in Alaska but whose payroll records were located in Seattle?

A. Any records they had, yes.

Q. Do you express opinions to employers as to the coverage or non-coverage of the Fair Labor Standards Act of particular employees during your inspections?

A. Did you say during any inspection? Is that it?

Q. Yes.

A. That is our regular procedure, but not to disclose it to the employer or employee indiscriminately. We make an inspection to secure compliance with the Fair Labor Standards Act and the necessary information is furnished to the firm to show them whether they are in violation, at the conclusion of the inspection.

Q. Is that the normal procedure?

A. That is the normal procedure.

Q. And that was true during 1944?

A. Yes.

By Mr. Flood:

Q. May I ask that the witness be shown Exhibit 73.

(Document handed to the witness.)

A. O.K.

Q. Are you familiar with that letter, Mr. Neubert?

A. I wrote it. [549]

CLIFFORD T. McBRIDE,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Will you state your name, please?

A. Clifford T. McBride.

Q. Where do you reside?

A. 769 Lakeview Boulevard, Seattle.

Q. By what firm or organization are you now employed?

A. Birch, Johnson & Lytle.

Q. What is your position with that firm?

A. Business Manager.

Q. During the years 1944 and 1945 by what firm or organization were you employed?

A. 1944 and 1945? [554]

Q. 1944 and 1945?

A. By Birch-Morrison-Knudsen Company.

Q. That is one of the defendants in these causes? A. Yes.

Q. As an employee of Birch-Morrison-Knudsen, what position did you occupy?

A. Business Manager.

Q. Did you occupy that position throughout your employment by Birch-Morrison-Knudsen?

A. I did.

Q. As the business manager of Birch-Morrison-Knudsen, Mr. McBride, what if any duties did you have in connection with the establishment of wage

(Testimony of Clifford T. McBride.)

scales, salary payments, holiday and overtime compensation and similar matters?

A. To see that all instructions received from the War Department were complied with in accordance with the terms of our contract.

Q. Were those conditions under your jurisdiction and supervision? A. They were.

Q. Do you have here, Mr. McBride, so that we can get the information for the record, the dates of the several contracts entered into between the Birch-Morrison-Knudsen organization and the War Department? [555] A. Yes, I do.

Mr. DeGarmo: It has been stipulated, if your Honor please, that these contracts are in all essential matters identical with Exhibit 13, but for the record I wish the dates, and I think it is material for the court to have the dates of those contracts.

Q. (By Mr. DeGarmo): Will you first refer to Contract Number 500, Mr. McBride, and give us the date of that contract?

A. Contract 500, which covers the work at Shemya is dated on December 31st, 1943.

Q. By what representative of the government—of the War Department is it signed?

A. Signed by Brigadier General J. D. Nold for the Army.

Q. Now, will you refer to Contract 501 and give us the date of that; also state what particular island or military area it covered where the work was performed.

(Testimony of Clifford T. McBride.)

A. 501 covered the work at Adak and it is of the same date, December 31, 1943, and it is likewise signed by General Nold.

Q. That is the same individual, I believe, Mr. McBride that it has been stated signed Exhibit 13, the prime [556] contract of the Guy F. Atkinson Company, isn't that true?

A. Yes, that is so.

Q. Now, look at 502 and tell us what the date of that contract was?

A. That was of the same date and by the same signatures.

Q. What island or area was the work to be performed on?

A. 502 covered Amchitka.

Q. Is it 1360?

A. 1360 covered the work at Fort Randle, commonly known as Cold Bay, on the Alaskan Peninsula; that was signed on the 16th of February 1945 by Col. J. D. Lang, Contracting Officer for the War Department.

Mr. Flood: Were there employees of the plaintiff employed up there?

Mr. DeGarmo: Only the employee McNally, I believe.

Q. (By Mr. DeGarmo): Now, will you refer to 1499?

A. 1499 covered the work on the Island of Attu, and it was signed on the 25th day of June, 1945 and signed for the Army by Col. J. D. Lang.

Q. Mr. McBride, do the contracts 500, 501, 502,

(Testimony of Clifford T. McBride.)

1360 and 1499 constitute all of the contracts under which any of the plaintiffs in these actions worked?

A. That is correct.

Q. Now, referring, Mr. McBride, to the period immediately following the discussion of the contracts 500, 501, and 502 which you stated were December 1, 1943, will you state whether you participated in any meetings relative to the formulation of wage and salary schedules and overtime practices for the performance of these contracts?

A. I did.

Q. Can you state where those meetings were held and who were the others present?

A. At various offices in the Central Building.

Q. By the way, where was the office of Birch-Morrison-Knudsen at that time?

A. In the Central Building.

Q. And did the Army Engineers also have an office in the Central Building at that time?

A. The Contracting Officer did.

Q. You haven't told us, now, who was present at those meetings?

A. The Contracting Officers, various members of their staff.

Q. Can you give those by name so that we will know who you are speaking of?

A. Major Tait, Mr. Noble, Mr. Burns, I believe Mr. Radke, [558] Mr. Rehfeld, Mr. Shepherd, Mr. Kimple—the latter three being auditors. At various times representatives of the Atkinson Company, Mr. Northcutt, Mr. Nord, and Mr. Doyle.

(Testimony of Clifford T. McBride.)

West Construction Company was represented by Mr. McLeod—and I do not recall the name of the personnel manager at this time.

Q. For the Guy F. Atkinson Company?

A. For West. And representatives from Macco—Puget Sound MACCO—and also representatives from the Inland Construction Company, or subcontractors.

Q. Will you refer, Mr. McBride, to Exhibits 14 and 15. Had the Birch-Morrison-Knudsen Company, as an organization, operated prior to the inception of the Contracts 500, 501, 502?

A. No, they had not.

Q. You were, then, a new establishment as far as Executive Order 9250 was concerned?

A. We were.

Q. During the course of your conferences and the preparation of the Contracts 501 and 502, did you have occasion to learn of Circular Letters 2236 and 2390, otherwise known in this case as Exhibits 14 and 15? A. I did.

Q. Mr. McBride, there has been testimony in this case concerning Exhibit 42. Will you refer to the exhibit and [559] first state if you are familiar with it. A. I am.

Q. Will you state, Mr. McBride, whether you participated in the preparation of certain of the material which was incorporated into Exhibit 42?

A. Yes, I did. I spent considerable time on it.

Q. In what particular portion of the exhibit did you participate?

(Testimony of Clifford T. McBride.)

A. In setting up the job descriptions and also preparing the organization charts for Birch-Morrison-Knudsen and the Inland Construction Company, which is part of this submission.

Q. What relationship to the Birch-Morrison-Knudsen Company did the Inland Construction have?

A. They were our subcontractors on two locations—Amchitka and Shemya.

Q. Mr. McBride, to what portion of your employees did Exhibit 14, being Circular Letter Number 2236, apply? I am speaking only of non-manuals.

A. Jobsite employees.

Q. To what portion of your non-manuals employed did Circular Letter 2390 apply?

A. To those employed in Seattle only.

Q. Mr. McBride, what is the fact as to whether the employees of Birch-Morrison-Knudsen Company in the [560] Seattle office worked under written employment contracts?

A. There were no contracts in the Seattle office.

Q. Not at any time during the period of the Birch-Morrison-Knudsen contracts?

A. No, there were not.

Q. Will you state, Mr. McBride, what is the fact as to whether the Birch-Morrison-Knudsen Company, prior to the effective date of the so-called Abersold Directive, Exhibit Number 16, paid its help—the non-manual employees—at the jobsite in Alaska in conformity with the provisions of Circular Letter Number 2236?

(Testimony of Clifford T. McBride.)

A. Until receipt of the Abersold letter, 2236 applied to all non-manuals at the jobsite.

Q. My question stated—prior to the receipt of the Abersold Directive.

A. They were paid in compliance with 2236 until that time.

Q. And with reference to the Seattle office employees what is the fact as to whether your Seattle office employees, prior to the effective date of the Abersold Directive, were paid in conformity with the provisions of Circular Letter Number 2390, Exhibit 15?

A. 2390 governed the Seattle office employees from the [561] inception of the contract until the receipt of the Abersold letter—directive.

Q. The question was—

A. They were paid under that.

Q. They were paid under that. What is the fact, Mr. McBride, as to whether the Birch-Morrison-Knudsen Company received the Abersold Directive from the War Department?

A. We received it—I don't remember just in particular what day—but I would say somewhere around the 20th of April.

Q. I think, Mr. McBride, the transmittal letter is dated May 5, if I am correct. Do you have a record of that? It is Exhibit 43 in the Atkinson file.

Will you hand this to the witness and perhaps that will enable him to fix an exact date for the Birch-Morrison-Knudsen.

A. It was received by us on May 4, 1944.

(Testimony of Clifford T. McBride.)

Q. Are you familiar, Mr. McBride, with the salary practices and policies and particularly the overtime practices of the Birch-Morrison-Knudsen Company? A. I am.

Q. Will you state what is the fact as to whether, subsequent to the receipt of the Abersold Directive, Exhibit 16, the Birch-Morrison-Knudsen Company conformed [562] to the provisions of that Directive in so far as the payment of the salaries of its employees and in particular overtime is concerned?

A. We did.

Q. Reference is made in the Abersold Directive to certain retroactive applications of that document, Mr. McBride. Are you familiar with that?

A. If my memory serves me right, it was retroactive beyond a date necessary for our use—back to—

Q. To November 1, 1943, may I suggest?

A. Yes; which was previous to the start of our job.

Q. And what is the fact as to whether, subsequent to receipt of the Abersold Directive, you followed that directive in making payment of back salaries where your previous payments had not been in conformity with the directive?

A. If I recall right, all of our payments were in conformance with the directive.

* * * *

[563]

By Mr. DeGarmo:

Q. Mr. McBride, will you state what you and, through you, the Birch-Morrison Corporation re-

(Testimony of Clifford T. McBride.)

lied upon in the establishment of its salary policies and overtime pay policies?

Mr. Flood: I object to that as a conclusion and self-serving, at that.

The Court: Objection overruled.

A. We depend upon the prime contract and the various directives received from the War Department and the Wage Administration Agency of the War Department.

Q. (By Mr. DeGarmo): When you speak of the various directives, Mr. McBride, do you refer to those written documents which have been introduced in evidence in this case? A. I do.

Q. During the years 1944 and 1945, what was your understanding, Mr. McBride, as to whether the non-manual employees of the Birch-Morrison-Knudsen Company were covered by the labor provisions of the Fair Labor [583] Standards Act?

Mr. Flood: I object to it, your Honor, on the ground it is incompetent, irrelevant and immaterial. It calls, of course, first for a mere argument and conclusion from the witness. And the question calls for an argumentative answer. But more than that, his understanding and opinion and the understanding and opinion of the company do not make or unmake or affect liability. Even if the company felt that their conduct was not violative of the Fair Labor Standards Act, their liability rests upon what they did and not what they thought.

Material to this defendant are only such rulings, orders, and enumerated rulings from the various

(Testimony of Clifford T. McBride.)

agencies named in Section 9 of the Act. The Act does not grant any exoneration or any exemption from liability on the basis of what this witness may have thought.

The Court: Does anyone connected with the case recall a similar question and a court ruling upon it during the prior days of trial?

Miss Krug: Yes.

Mr. DeGarmo: I believe so, if your Honor please. The question was argued, I think, somewhat extensively as to whether the mental attitude or the [584] mental understanding or belief of the individual was important in determining whether he exercised good faith or not; and it is offered upon the question of good faith.

The Court: Do you have a contention as to what the court's ruling was when the matter was presented before or do you assert that it has been presented in this form once before or at other times?

Mr. DeGarmo: It is my belief, your Honor, that it was presented in the examination of Mr. Northcutt and that the court permitted it upon the basis that the mental state of the individual was very material.

The Court: On the question of good faith?

Mr. DeGarmo: Yes.

Miss Krug: I believe the same ruling, Mr. DeGarmo, refers to or perhaps I am thinking of a different ruling—your Honor sustained an objection to a question similar to this which was asked of Mr. Northcutt, not on the ground that the men-

(Testimony of Clifford T. McBride.)

tal state was not competent, but on the ground that the question was phrased in such a way that it required the witness to find the ultimate fact which the court has to find in the case. [585]

In this particular instance, this question would ask this witness to determine whether or not Section 11 is available as a defense to these defendants and it was on that ground that your Honor sustained the objection.

Your Honor did not hold that the mental state could not be shown; but that a question such as this calling for the conclusion of the witness on an ultimate fact to be proved was not proper.

Mr. DeGarmo: The question I asked does not call for such a conclusion. My question was what was his understanding and belief. His understanding is what he himself understood. He may have been wrong, but I want to know whether he understood that they were or were not subject to the Act.

The Court: There is a possibility that the court might make a ruling inconsistent with that made previously, but I believe that—of course, understanding may involve an attitude of contractual mind. I believe the word “belief” is the more accurate state of my question. The court will overrule the objection to the use of this question in the form if confined to the word “belief” rather than “understanding.”

Mr. DeGarmo: I will rephrase the question to [586] conform to the court's ruling.

(Testimony of Clifford T. McBride.)

(Last question repeated by the reporter as follows:

“Question: During the years 1944 and 1945, what was your belief, Mr. McBride, as to whether the non-manual employees of the Birch-Morrison-Knudsen Company were covered by the labor provisions of the Fair Labor Standards Act?”)

A. I did not believe we were covered.

Q. (By Mr. DeGarmo): Mr. McBride, during the time of the performance by the Birch-Morrison-Knudsen Company of the contracts which you mentioned earlier in your testimony as 500, 501, 502, 1360 and 1399, will you state whether any examination was made of your records by the Wage and Hour Administration of the Labor Department?

Mr. Paul: I object on the ground that the stipulation covers this. The parties have stipulated that the attitude of one company—whatever happened to one company happened to them all. Counsel is trying to vary the terms of the stipulation and I object to [587] it.

Mr. DeGarmo: I was not attempting to vary the terms of the stipulation. If counsel thinks I am, I will withdraw the question. My purpose was to show that there was no follow-up by the Wage and Hour Administration. They made the one inquiry of the Guy F. Atkinson Company and none of the rest of us heard anything more of it.

If Counsel thinks I am violating the stipulation,

(Testimony of Clifford T. McBride.)

I will withdraw it. I had no intention of violating it.

Mr. Paul: I have made my objection, your Honor.

Mr. Graham: Does Counsel stipulate that, as a matter of fact, there were no other—

Mr. Paul: I don't stipulate to anything.

The stipulation as reduced to writing is here.

The Court: Will you read the part of that you feel is inconsistent with this question or makes it inappropriate to ask this question? and you may have the files, if you would like.

Mr. Paul: Page 3 of the Stipulation and Pre-trial Order, paragraph (a):

“All evidence, documentary or oral, relating to any one of the defendants, shall be deemed to relate to all of [588] the defendants and all documents or communications sent to or received by one defendant shall be deemed to have been sent to, received by, or come to the attention and within the knowledge of all other defendants. All information, knowledge, beliefs, and actions of any of the defendants shall also be deemed to be the information, knowledge, beliefs and actions of all other defendants.”

Mr. DeGarmo: We do not intend by this question, if your Honor please, to deny or change the stipulation that we knew of the investigation made of the Guy F. Atkinson Company record by the Wage and Hour Administration.

(Testimony of Clifford T. McBride.)

Again, I state that the limited purpose of this question is to show that the Wage and Hour Administration did not follow up as to any of the other defendants here with reference to any further investigation after or prior to that which was made of the Guy F. Atkinson Company. I do not believe that that is inconsistent with or contrary to the terms of the stipulation. [589]

The Court: In what way do you feel that it is inconsistent—I will ask any of counsel for the plaintiffs who might have an objection to this question.

Mr. Paul: I won't express an opinion as to the limited purpose that counsel is offering it for. I will add a further objection that it has no probative value. Let us assume that the Wage and Hour people did no more than write Exhibit 76, I believe it is, the Neubert letter—that is sufficient to put them on knowledge.

If they did no more than that, the notice is there. So that any further action will not change the circumstances of this case.

The Court: The objection is overruled.

If you have in mind the question, you may answer it.

(Last question repeated by the reporter.)

A. No, there was none made.

Q. (By Mr. DeGarmo): If the same statement as to the limitation of the purpose for which the question is asked was stated by me with reference to the previous question, Mr. McBride, I will ask if the Birch- [590] Morrison-Knudsen Company

(Testimony of Clifford T. McBride.)

was ever informed by the Wage and Hour Division of the Labor Department either orally or in writing during the performance of these several contracts that it was in violation of the Fair Labor Standards Act?

A. They were not.

Mr. DeGarmo: I have no further questions.

The Court: You may cross-examine.

Cross Examination

By Mr. Paul:

Q. Mr. McBride, did employees of your company file claims with your company for overtime compensation under the Fair Labor Standards Act? A. Yes, they did.

Mr. Graham: May I ask to what period of time counsel's question was directed?

Mr. DeGarmo: He didn't limit it.

Q. (By Mr. Paul): During the years 1944—

A. During the latter part of 1944.

Q. —and '45? A. And '45.

Q. Did you request the advice of the Contracting Officer as to whether or not a judgment for overtime compensation [591] under the Fair Labor Standards Act would be reimbursible by the United States Government?

A. Not that I recall. We assumed it would be, under the terms of our contract.

Mr. Paul: That is all, your Honor.

Cross Examination

By Mr. Flood:

Q. Mr. McBride, did you at any time during

(Testimony of Clifford T. McBride.)

the course of the construction work up there in the Aleutians—or any officer of the company—ever ask the Contracting Officer or the War Department for an administrative regulation, order, or ruling with respect to whether or not the Fair Labor Standards Act covered the employment up there?

A. I think I answered that in the previous question.

Q. Well, will you answer it now?

A. Not that I recall.

Q. And you never made any inquiry with respect to whether any of the plaintiffs in this action who are employees of the BMK Company, were or were not covered by the Act, did you?

A. We were furnished with the Wage scale—

Q. You can answer that yes or no and then, if you want to, make a comment. Can you answer that yes or no? [592]

Mr. DeGarmo: I think there should be some limit of time as to when this was asked.

(Last question repeated by the reporter.)

Q. (By Mr. Flood—continuing): During the course of their employment from January, '44, to February, '45. A. Not that I recall.

Mr. Flood: That is all.

The Court: Is there anything further by anyone?

Mr. DeGarmo: That is all, Mr. McBride.

Mr. Flood: Just a moment, if your Honor please. May I—

The Court: You may confer.

(Testimony of Clifford T. McBride.)

Q. (By Mr. Flood): Did you at any time during the life of the contract applicable to Shemya Island, Contract 500, 501, 502, 1360 and 1499 and during the progress of the work under those contracts ever consult any attorney to determine whether or not the Fair Labor Standards Act applied?

A. We had suits in this court on some of those contracts that were running; at that time we were represented by counsel.

Q. Do you know of any such case, Mr. McBride—are you [593] sure about that?

A. If I recall right, the Soderberg case.

Q. That arose when?

A. Some time in the fall of '44.

The Court: In what court was that tried?

Mr. Paul: Before Judge Bowen—before your Honor.

The Court: In what court was it tried?

The Witness: As I recall, it was tried in this court, here.

Q. (By Mr. Flood): Apart from any litigation with respect to the applicability of the Fair Labor Standards Act, did you at any time prior to that make any inquiry of counsel or an attorney as to whether the Fair Labor Standards Act had any application to the employments under those contracts?

A. No; for the reason that—

Q. All right, if you have a reason state it.

A. We were given a contract by the govern-

(Testimony of Clifford T. McBride.)

ment and a wage structure, and we didn't have any reason at all to believe that the War Department would direct us to do anything that would conflict with any other law.

Q. What you thought you were doing was just to follow [594] the contract literally?

A. We were bound to follow the contract.

Q. Well, did you think you were following the contract literally? A. We did.

Q. Did you think that if you didn't follow the contract you wouldn't get reimbursed?

A. Well, I presume we probably thought that. But we had a contract and it was our intention to follow it.

Q. Did you think that you had to follow every instruction on every subject that you received from the War Department; otherwise, your items would not be reimbursible?

A. I don't think we thought of it in that light.

Q. May I ask you to examine Exhibits 21 and 75, and ask you whether or not you are familiar with them. Now, I will take them one at a time, 21 and 75. Are you familiar with Exhibit 21?

A. No, I am not. That was issued six months prior to the commencement of our contract.

Q. Are you familiar with Exhibit 75?

A. I had seen Exhibit 75 but it did not apply very much to BMK because we started out with a 40-hour week in Seattle. We didn't have the problem of converting it.

Q. Your answer then is that you are familiar with [595] Exhibit 75? A. Yes.

(Testimony of Clifford T. McBride.)

Mr. Flood: That is all.

The Court: I would like to get the "because" part of the witness' answer. Will you repeat that, Mr. Reporter?

(The reporter repeated the last answer of the witness referred to as follows:

"Because we started out with a 40-hour week in Seattle. We didn't have the problem of converting it.")

The Court: What is the significance of that part of the answer?

The Witness: Atkinson had been running on a 44-hour week. We started out on a 40-hour week, so we didn't have the problem of conversion in the Seattle office.

The Court: Conversion?

The Witness: From a 44-hour to a 40-hour work week.

The Court: Does anyone else have any further question?

Mr. DeGarmo: That is all. [596]

The Court: Step down. Call the next witness.

(Witness excused.) [597]

Mr. DeGarmo: I think that is the defendants' case, if Your Honor please.

The Court: Do all of the defendants now rest.

Mr. Graham: That is right, Your Honor.

DON PECK,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Paul:

Q. What is your name? A. Don Peck.

Q. Where do you live, Mr. Peck?

A. 308 Marion Street, Seattle.

Q. Are you one of the claimants in the Lassiter case? A. Yes, I am.

Q. And you previously testified in the fall of 1945 in this case? A. Yes.

Q. You were employed by the Guy F. Atkinson Company during 1943, 1944, and 1945?

A. That is right.

Q. What was your job?

A. I was in the Auditing Department as an accounting clerk.

Q. With what documents did you work?

A. With the reimbursement vouchers. [598]

Q. In the fall of 1943, were there adjustments made in rates of pay to Seattle office employees of Guy F. Atkinson Company that you noticed on reimbursement vouchers? A. Yes.

Q. In brief just what were the adjustments?

A. It was a conversion of our weekly salary from a 44-hour to a 40-hour basis.

Q. Under the new system were you paid time and a half, after 40 hours? A. Yes.

Q. Was there any difference in take-home pay

(Testimony of Don Peck.)

between the old and the new system, for a 44-hour week? A. No, there wasn't.

Mr. Graham: If your Honor please, I don't mean to interrupt counsel's line of inquiry but I should like to know the materiality of the inquiry. I believe all of this material is a matter of record in the case in chief.

Mr. Paul: If counsel will bear with me, I will tie it up shortly.

Q. (By Mr. Paul): Shortly after November 1, 1943, did you make any protest with respect to this so-called conversion? [599] A. I did.

Q. What protest did you make?

A. An oral protest to Mr. Doyle and to Mr. McIver.

Q. What did you tell Mr. Doyle and Mr. McIver—excuse me. Who were Mr. Doyle and Mr. McIver?

A. Mr. Doyle was the Personnel Manager and Mr. McIver was my immediate superior, the Chief Auditor.

Q. What did you tell those two company officials?

A. I didn't tell them anything. I just inquired as to how it was being done. I didn't quite see their point in the conversion and I thought it was wrong.

Q. Did you mention any particular law that you had in mind at that time?

A. No, I did not.

Q. What date was this?

(Testimony of Don Peck.)

A. This was in mid-November.

Q. Of what year? A. 1943.

Q. Did you have any other talks subsequent with company officials at which a law was mentioned? A. Not in the year 1943.

Q. When was such a conversation?

A. In early '44.

Mr. Graham: I object to the question, if your Honor please. Counsel in his question has [600] assumed a fact which the witness has not established nor does the record establish it.

The Court: Establish the basis for assuming the point.

Q. (By Mr. Paul): What was the conversation in early 1944 with the company officials relating to rates of pay?

Mr. Graham: And who was it? Will you accept that amendment to the question?

Q. (By Mr. Paul, continuing): And with what company officials were they?

The Court: With what persons acting as such officials, is that what you mean?

Mr. Paul: Yes, your Honor.

A. Well, I always talked with my immediate superior, Mr. McIver, and Mr. Doyle.

Q. (By Mr. Paul): What did you tell them in early 1944?

A. Well, I found out later that I thought and I was of the opinion that it was in violation of the Fair Labor Standards Act.

Q. (By the Court): Did you bring that thought

(Testimony of Don Peck.)

home to these superiors of yours? otherwise, it wouldn't [601] have any point in this inquiry?

A. Yes, sir.

Q. (By Mr. Paul): Had you taken any other action in respect to your rate of pay besides talking to the two company officials?

A. I filed a claim with the Wage and Hour Board in December, 1943.

Q. Do you recall the name of the person you talked to in the Wage and Hour office?

A. It was just a clerk that I filed the claim with. I don't know who it was.

The Court: When was that?

The Witness: December, 1943.

The Court: You filed a claim with a clerk in the Wage and Hour Division?

The Witness: Yes, sir.

The Court: Based on what?

The Witness: Based on the non-payment of overtime and the credit of the basic salary.

Mr. Graham: May I inquire on voir dire for a moment, your Honor. I would like to inquire, if your Honor please, as to the nature of this claim before permitting the answer to the last question.

The Court: You may inquire. [602]

Voir Dire Examination

By Mr. Graham:

Q. Was this claim in writing or was it oral?

A. In writing.

Mr. Graham: I move that the answer be strick-

(Testimony of Don Peck.)

en to the previous question, as not being the best evidence that a claim was filed.

The Court: It seems at this stage that you ought to be able to produce those documents.

Mr. Paul: Your Honor, we have had many, many arguments about the confidential nature of records in the Wage and Hours office. Counsel, himself, with great solicitude for Mr. Neubert, recited that he had an understanding with Mr. Marks that he was not to ask about any confidential matter.

Now, I can subpoena Mr. Neubert duces tecum. We are going to have another fight on our hands and I know what is going to happen—they are going to be considered confidential.

Mr. DeGarmo: It has not been established, yet, that this witness has no copies of his claim.

Direct Examination—(Continuing)

Q. (By Mr. Paul): Do you have a copy of that claim, [603] Mr. Peck?

A. I have no copy of the claim.

Mr. DeGarmo: I think the matter should be left with the fact that he filed a claim and that is the end of it.

The Court: The objection to the question is overruled.

Mr. DeGarmo: I think the questions to which Mr. Graham had reference were the answers to questions by your Honor, yourself—as to overtime and so forth.

The Court: Mr. Reporter, read the Court's questions.

(Testimony of Don Peck.)

(Questions and answers of the court read by the reporter.)

The Court: The objection to that will be overruled.

Mr. Graham: May I move to strike from the record any reference to the contents of the matters in the claim?

The Court: Do you wish the court to consider the objection addressed to that particular question and answer?

Mr. Graham: Yes. [604]

The Court: So considered, the court denies the motion.

Mr. Flood: At what time does your Honor wish to take a recess? I might or might not have one question of the witness, depending upon a conference with counsel.

The Court: Court will be in recess for five minutes.

(Recess.)

The Court: You may proceed.

Cross Examination

By Mr. Flood:

Q. Mr. Peck, you never received a reply from the Wage and Hour Division to the claim that you speak of which you filed? A. Yes, I did.

Mr. Flood: I would like to have this marked and shown to the witness.

(Letter marked as Plaintiffs' Exhibit 82 for identification.)

(Testimony of Don Peck.)

Q. (By Mr. Flood): Will you examine that, please? and state whether or not it is the reply which you received? [605]

A. Yes.

Mr. Flood: I offer it, your Honor.

Mr. Graham: I object to the offer, if your Honor please, for the reason, first, that the document bears a date in June or July, 1946, obviously completely immaterial to any issue in this case, these actions being filed a substantial period of time prior thereto; and, secondly, it is a reply from a representative of the Wage and Hour Division addressed to this witness on the stand with no showing of its being communicated to the defendant or any of them at any time, much less at a time material to these issues.

Mr. Flood: I am offering it, your Honor, to serve to identify the original claim and the character of the claim and the eventual disposition that was made of the claim.

The Court: The objection is sustained; at least that part of it which relates particularly to the circumstance that the instrument was created subsequent to the institution of this action.

Mr. Flood: I then offer it, your Honor, for the limited purpose of identifying the claim made by this witness on January 5, 1943 as a claim based upon the Fair Labor Standards Act—as a claim when it was made that was then based upon the [606] Fair Labor Standards Act; for that purpose and no other.

(Testimony of Don Peck.)

Mr. DeGarmo: It would be objectionable for the same reasons and on the additional ground that there has been no showing as yet that the claim, itself, as made in 1944, was ever brought home to any of the defendants or any of the defendants' representatives.

Mr. Flood: I think the testimony clearly shows that.

He testified that he first made his claim to Mr. Doyle and to Mr. McIver. Then he went up and made a claim to the Wage and Hour Division, the original of which was not available. This identifies that claim as a claim that was made under the Fair Labor Standards Act.

Mr. DeGarmo: Of course, he is trying to tie two things together which have no objection. The fact that he made an oral claim to Mr. McIver and Mr. Doyle might be relevant but certainly the fact that he made a claim to someone else without its being shown that it was ever brought home to any of the defendants or the defendants' representatives could have no possible bearing to the issues in this case. This is an attempt to remedy the fact that [607] they can't produce proper evidence of the first claim, even if it could be so produced.

Q. (By Mr. Flood): Before you made that claim to the Wage and Hour Division, did you discuss the matter of the claim with Mr. McIver or Mr. Doyle or either of them?

Mr. DeGarmo: I object to that, your Honor, upon the ground "the subject matter of the claim."

(Testimony of Don Peck.)

I would like to know whether he discussed the claim or the subject matter. They are two different things. He has already testified that he did discuss certain features of the Fair Labor Standards Act.

Mr. Flood: I think that is quibbling, your Honor.

The Court: I think that objection should be overruled.

Q. (By Mr. Flood): With whom did you discuss it? A. Mr. McIver and Mr. Doyle.

Q. Did you ever notify them or either of them that you were going to present a claim to the Fair Labor Standards Act? A. Yes, I did. [608]

Mr. DeGarmo: That is objected to on the ground it is leading, your Honor.

The Court: Objection overruled.

Q. (By Mr. Flood): State whether or not you ever did notify either of them that you intended to file a claim. A. I notified each of them.

Q. What was their attitude or advice?

A. No advice—their attitude was just to go ahead.

Q. What did they say to you?

A. I can't recall, but their attitude was just "go ahead."

Q. Did they state whether or not they had any objection to your doing so?

A. No objection.

Mr. Flood: I now offer it for limited purposes.

Mr. DeGarmo: What purposes?

Mr. Flood: Did you ever tell them that you had filed a claim? A. Yes, I did.

(Testimony of Don Peck.)

Mr. DeGarmo: Apparently Counsel feels it is necessary to corroborate his own witness. I hadn't thought that that was necessary.

Mr. Flood: I now move not for any purpose [609] that Counsel puts in my mouth, but for the express purpose of identifying the original claim which was made under the Fair Labor Standards Act.

The Court: I understand an objection has been made on the ground, among other grounds, that the document was created or came into being subsequent to the filing or commencement of this action. Is that objection still made?

Mr. DeGarmo: It is.

Mr. Graham: It is, your Honor.

The Court: I believe it is, and the objection is sustained.

Mr. Flood: Do you also sustain my motion for limited admission?

The Court: The objection is sustained and the offer of it in evidence is rejected by the court.

Mr. Flood: No other questions.

The Court: Are there any other questions on the part of anyone?

Mr. Flood: For the record, your Honor, I offer to prove by this witness that the document marked as Exhibit 82 was received by him on or about the date that it bears. I make that offer in support of the limited admissibility—my motion for limited admissibility. [610]

Mr. Graham: If your Honor please, he has already proved that from the witness.

(Testimony of Volney J. Babcock.)

Mr. Flood: If I didn't make that offer, the document would not be in the record. The court has rejected it, so it is the only way that I have of preserving the record.

The Court: Is there any objection to the offer or what was just then said by counsel?

Mr. DeGarmo: Well, the offer is improper because the witness has already testified to the fact upon which he is now making an offer. The document has been offered. It is an identified exhibit. It speaks for itself.

The Court: The court sustains the objection to the offer for the same reasons that the court made in the rulings heretofore announced. You may note an exception.

Mr. Flood: That is all.

The Court: Is there anything further from this witness that anyone wishes to adduce?

Mr. DeGarmo: No questions, your Honor.

Mr. Graham: No questions.

The Court: You may be excused.

(Witness excused.) [611]

The Court: Call your next witness.

Mr. Flood: Mr. Babcock.

VOLNEY J. BABCOCK,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Flood:

Q. What is your name?

A. Volney J. Babcock.

Q. Where do you live, Mr. Babcock?

A. I live at 4417 47th Avenue Southwest, Seattle.

Q. Were you one of the original claimants in the Lassiter Case? A. I am.

Q. You were employed by Guy F. Atkinson Company during 1943, '44 and '45? A. Yes.

Q. Did you have any conversations with company officials with respect to the Fair Labor Standards Act? A. Yes.

Q. Did you have any conversations with company officials with respect to the Fair Labor Standards Act? A. Yes.

Q. With whom did you have such conversations?

A. I had them with Mr. Doyle, Mr. Rice, Mr. McIver, and [612] Mr. Northcutt.

Q. When was the first of such conversations?

A. In the latter part of 1943.

Q. With whom was such conversation in the latter part of 1943 had, of the four men?

A. With Mr. Doyle, Mr. McIver, Mr. Rice, and Mr. Northcutt?

(Testimony of Volney J. Babcock.)

Q. All four of them? A. Yes.

Q. What was the conversation that you had in respect to the Fair Labor Standards Act with the four men during the latter part of 1943?

A. Well, the conversation was with regard to whether the company was paying, following the rules of the Act; also, as to whether the company was covered by the Act.

Q. How many such conversations did you have during that period on the subject—during 1943, the latter part of 1943?

A. I wouldn't know for sure. I would say four or five.

Q. Did you protest to the four men the rates of pay that they were then using with respect to the Fair Labor Standards Act?

Mr. DeGarmo: That is objected to on the ground it is leading. [613]

The Court: Objection sustained.

"What were the words or the substance of the words used in the conversation," wouldn't that get at it?

Mr. Paul: Yes.

The Witness: Well, in the first change, in November, 1943, the employees objected to the fact that our hourly wage was reduced to go onto a 40-hour week. That is, they took a 44-hour week and divided it by 44 and went onto a 40-hour week. Then, when we came back onto time and a half, it amounted to the same thing as we were getting before. I should say they took a 44-hour week and divided it by 46.

(Testimony of Volney J. Babcock.)

Q. That is what is known as the Seattle Conversion? A. That is right.

Q. How, if at all, was the Seattle conversion of the hourly rate connected with the Fair Labor Standards Act?

Mr. DeGarmo: If your Honor please, that calls for this witness' construction of the legal effect of the change, it seems to me.

Q. (By Mr. Paul, continuing): In the conversations with the four company officials. [614]

The Court: Do you mean what was said?

Mr. Paul: Yes.

The Court: The objection is overruled.

A. Well, this in itself lowered our hourly wage rate, and, in addition to this, the schedule of wages that established — put us in the groups. Some groups got time and a half, some groups got straight time, some groups got no overtime. We objected to their grouping us in certain pay groups because we were still hourly employees.

Q. (By Mr. Paul): Were subsequent conversations held during 1944 on the subject matter of the Fair Labor Standards Act as applicable to the Seattle office employees?

A. I left Seattle in the last week of '43 and didn't return until September of '44; and after that time I did have additional conversations regarding it.

Q. You did not, or you did? A. I did.

Q. With whom were they?

A. With the same officials I mentioned before,

(Testimony of Volney J. Babcock.)

with the exception of Mr. Northcutt who had already left. Mr. Nord had been manager.

The Court: Excepting Mr. Northcutt, did you [615] say?

The Witness: Yes.

The Court: Is there anything further to be asked of this witness?

Mr. Graham: Yes, your Honor. We would like cross-examination.

The Court: You may cross-examine.

Cross Examination

By Mr. Graham:

Q. Mr. Babcock, as I understand, what you stated with reference to this Seattle conversion problem, you were concerned because there was a reduction in your hourly rate, is that correct?

A. That is right.

Q. In other words, you were concerned with whether or not the Wage Stabilization Act had been violated, were you not?

A. Not only that, but the wages and hours.

Q. Do you know of anything in the wages and hours law which prevents reduction in hourly rates of pay?

A. I don't know of anything myself.

Q. Did you at that time believe there was any such provision in the Fair Labor Standards Act that prevented reduction in hourly rates of pay?

A. No, we didn't; as employees we weren't familiar with all of the laws about it. We simply objected to having our hourly rate of pay lowered.

(Testimony of Volney J. Babcock.)

Q. In other words, your whole point was that your hourly rate was being lowered and you were squawking about it, is that it?

A. That is one of them; and the other was that we weren't being paid time and a half.

Q. After the conversion?

A. It just so happened that after the conversion I got into a different group.

Q. You indicated that you discussed the matter of coverage of the Fair Labor Standards Act with these men—I understood you to testify—as a matter of fact, they told you that the company wasn't covered by the Fair Labor Standards Act, didn't they?

A. No.

Q. What classification did you go into, Mr. Babcock, after the conversion?

A. Class B.

Q. What was your classification?

A. Recruiter.

Mr. Graham: I have no further questions. [617]

Redirect Examination

By Mr. Paul:

Q. Were Class B employees paid overtime after conversion?

A. At straight time.

Q. You were paid at straight time and not at time and one-half after forty hours?

A. That is right.

Mr. Paul: That is all.

The Court: What kind of work did you do?

The Witness: I went into Class B. I was a recruiter.

The Court: What kind of work were you doing

(Testimony of Volney J. Babcock.)

when you talked to these four gentlemen named by you?

The Witness: I was a clerk in the Personnel Department.

The Court: You were not a recruiter?

The Witness: No.

The Court: Is there anything else?

Mr. Paul: That is all of this witness.

The Court: You may step down.

(Witness excused.)

Mr. Paul: I now offer into evidence 68, 69, 70 and 71, pursuant to the stipulation. [618]

The Court: Mr. Graham, I will hear you.

Mr. Graham: If your Honor please, the objections are contained in the Pre-trial Order and Stipulation of the defendants.

We object to each of these documents offered for the reason that there is no showing that they were brought to the attention of the defendants or any of them.

Furthermore, there is a stipulation here of record with reference to the testimony of Mr. Northcutt, reciting that neither of these documents were ever called to the attention of the defendants nor were their contents ever discussed with any of the defendants.

The Court: What relationship, if any, does the question as to the proper admission of these documents have with those interrogatories and depositions or parts of depositions sought by plaintiffs to be taken at the national capital?

Mr. Graham: They are the documents, your Honor.

Mr. Paul: Not entirely.

Mr. Graham: May I amend that statement? Counsel has corrected me. Exhibits 69 and 70, your Honor, are letters purportedly from the Administrator of the Wage and Hour Division of the Secretary of [619] the Navy. In his interrogatories sought to be addressed to the Administrator, Mr. Paul sought to establish that there were comparable letters addressed to the Secretary of War. The court will recall the ruling here of record as to the materiality of any such inquiry.

These documents are even one step further removed. They are addressed to the Secretary of the Navy.

The Court: Are these some of the documents or evidence which the court has previously held not relevant?

Mr. Graham: Document 68 is, your Honor.

Mr. Paul: At this time, your Honor, I would like to clear up a point that has been bothering me. This evidence, I believe, is clearly material and relevant on the issue of the administrative practice and enforcement policy which the—

Mr. Graham: If your Honor please, that has been withdrawn from the issues in this case.

Mr. Paul: I wanted it stated affirmatively that the defendants have abandoned that portion of Section 9.

Mr. Toulouse: Is that right?

Mr. Graham: Following the argument on the

[620] interrogatories, your Honor, there was a statement made. I do not have the Act here before me. The sum and substance of the statement made, your Honor, was that the defendants were not relying upon any administrative practice or enforcement policy of the Wage and Hour Division of the Department of Labor.

Our reliance of the defendants is upon those other exhibits which are the documents and regulations and orders and so forth of agencies other than the Administrator of the Wage and Hour Division.

The Court: Do you contend that that has some bearing upon whether or not the plaintiffs have a right to have the documents admitted?

Mr. Graham: I will say this: Mr. Paul offers these documents, recognizing that they are not material, I believe, on any inquiry as to the good faith of the defendants in relying upon War Department orders and administrative matters.

The Court: Do you contend or imply or wish the court to infer from your position that partly by reason of the fact that the defendants do not rely upon anything done by the Labor Department, these documents are not material or relevant?

Mr. Graham: They couldn't be material under [621] any circumstances, your Honor, if there is no reliance upon the administrative policy of the Wage and Hour Administrator.

I believe counsel agrees to that statement, do you not?

Mr. Paul: Apparently Counsel's argument is

that we are relying upon some other governmental administrative—what are the words? The section of the statute to which this is particularly addressed is “or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged.”

It is that portion of Section 9.

Apparently Counsel is construing that section—apparently he is offering that section as a defense for an enforcement policy or administrative practice of agencies other than the Wage-Hour, as even under their limited use of that portion of Section 9 we should be entitled to show that the enforcement policy of the Wage-Hour Division—

Mr. Graham: If your Honor please, I think we can shorten this a great deal. It was originally urged by the defendants that the administrative policy of the Wage-Hour Division was a non-enforcement policy as to CPFF contractors. Counsel offers [622] these documents ostensibly to show that the administrative policy of the Wage-Hour Division was enforcement against CPFF contractors. On behalf of the defendants we have stated that we do not rely upon any rulings of the Wage-Hour Administrator. Our reliance is upon the rulings of others. There is no reliance upon any policy of the Wage-Hour Administrator. And if we do not, there is absolutely no materiality to any of these documents for the reason that there is no showing that they were ever brought to the attention of any of the defendants to make any materiality on the issue of good faith. The record is to

the contrary and the stipulation shows that they were never brought to the attention of the defendants.

The Court: I will hear others of plaintiffs' counsel after Mr. Paul has finished.

Mr. Paul: I may not be finished but I will hear Mr. Toulouse.

Mr. Toulouse: My question is:

Do you or do you not rely upon that section of Section 9 that reads: "or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged." [623]

Mr. Graham: If you limit your question "Do you rely upon any administrative policy of the Wage-Hour Administrator" my answer is no.

Mr. Toulouse: Then, Counsel, do you mean you do not rely in this proceeding upon any negative action or any non-enforcement policy of the Wage and Hour Division?

Mr. Graham: I believe the record clearly contains the statement of the position of the defendants, your Honor.

The Court: Is there anything further to be said by anyone?

Mr. Paul: There is this to say that is new,—I call the court's attention to page 31 of the Interpretative Bulletin, to paragraph (b) in Section 790.18, d. The Section is entitled "Administrative Practice or Enforcement policy." It is a discussion of the Administrator relative to the sections of Section 9 under discussion.

Section (d) reads:

“In the statement of the motion on the part of the House accompanying the report of the Conference Committee on the Portal-to-Portal Act, it is indicated on page 16 thereof that under Sections 9 and 10 ‘an employer will be [624] relieved from liability in an action by an employee because of reliance in good faith on an administrative practice or enforcement policy only where such practice or policy was based on the ground that an act or omission was not a violation of the Fair Labor Standards Act or where a practice or policy of not enforcing the Act in respect to acts or omissions led the employer in good faith to believe that such acts or omissions were not in violation of the Act.’ ”

In other words, the practice must show that it was not a violation of the Fair Labor Standards Act. And certainly we can show the evidence of the Administrator’s position on that very problem.

The job descriptions contained in these exhibits are almost word for word with the type of employees that we are here dealing with,—the type of claimants that we are here dealing with.

Mr. Graham: If your Honor please, if these weren’t brought to the attention of the defendants, they have absolutely no materiality on the issue of our reliance upon good faith. These documents relate to what the Administrator thought about them. [625]

The record by stipulation shows that these were not brought to the defendants; they cannot affect in any manner, shape or form the reliance of the

defendants in good faith upon those orders, practices and policies upon which they did rely.

The Court: It would seem to the court that consistency in the court's rulings, if the court is to continue to adhere to the ruling already made at the time the depositions or interrogatories were sought to be taken or propounded, that it must follow that the objection here made must be sustained. The court would be justified in overruling the objection here made only if the court wished to change the court's position previously announced on that subject at the time of the taking of depositions of former Wage and Hour enforcement officials at Washington on these matters. The objection is sustained.

Mr. Paul: For the record, may I make an offer of proof, your Honor?

The Court: You may.

Mr. Paul: I would like to reiterate at this time my offer of proof on the depositions for the sake of a complete record. I offer to prove, by means of Exhibits 68, 69, 70 and 71 that they are copies of,—I will use the terms of the [626] stipulation, if I may see it, your Honor.

I offer to prove for the limited purpose of showing the administrative practice and enforcement policies of the Wage and Hour Division, with respect to the class of employers to which these employers belonged, that the Secretary of Labor had certified that Exhibits 68, 69, 70 and 71 are true, full, and correct copies of documents contained in the files of the Department of Labor, Washington, D. C., and that The Honorable James D. Forrestall,

Secretary of the Navy, has certified that Exhibits 69 and 70 are full, true and correct copies of documents contained in the files of the United States Navy Department, Washington, D. C.; and under my deposition that the War Department received copies,—received the original of Exhibit 68 and received an original which in all respects was a duplicate of Exhibit 69, except that it was addressed to the Secretary of War, The Honorable Henry L. Stimson, and that the War Department received the original of Exhibit 71 on or before May 1, 1943. As to my last statement on Exhibit 71, I withdraw the offer.

Mr. Graham: May that statement be for the record?

The Court: Does that complete your offer? [627]

Mr. Paul: Yes, your Honor.

Mr. DeGarmo: We object to the offer of proof on the same grounds as stated with regard to the record itself, your Honor.

The Court: The objection is sustained.

Mr. Paul: The plaintiffs rest, your Honor.

The Court: Are there any other questions to be asked of this witness?

Mr. Graham: None, your Honor.

The Court: Then the plaintiffs rest, as I understand?

Do the defendants likewise rest?

Mr. DeGarmo: Yes, if your Honor please.

The Court: Both sides having rested, is there anything further to be said or done at this time?

Mr. Flood: I know of nothing further at this time.

The Court: Believing that arrangements have already been made as to future hearing in these cases, court is recessed subject to those future appointments.

(At 4:00 p.m., Wednesday, January 7, 1948, both parties having rested, proceedings were recessed until January 22nd, 1948 for arguments of respective counsel in the United States Court House.) [628]

CERTIFICATE

I, Merritt G. Dyer, Official Reporter for the United States District Court, hereby certify that the foregoing is a full true and correct transcript of the proceedings at trial in the above-entitled causes.

/s/ MERRITT G. DYER,
Official Reporter.

[Endorsed]: Filed Jan. 29, 1948. [628A]

[Endorsed]: No. 11983. United States Circuit Court of Appeals for the Ninth Circuit. Vernon O. Tyler, Appellant, vs. S. Birch & Sons Construction Company, a Corporation, and Morrison-Knudsen Company, Inc., a Corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed July 19, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 11983

VERNON O. TYLER,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, et al.,

Appellees.

ORDER

The above-entitled matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the appellants herein for an order that the stipulation concerning evidence and pre-trial order and the

designated portions of the transcript of testimony may be printed in the case of *Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen, Inc., No. 11983 only*, and incorporated by reference in the other four cases, and the Court having considered the said motion, the file and record herein, and the stipulation of all parties in support thereof,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the stipulation concerning evidence and pre-trial order and the designated portions of the transcript of the testimony shall be printed in the case of *Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen, Inc., No. 11983 only* and in the remaining cases a copy of the stipulation in support of the said motion shall be printed in lieu of such portions and such portions of the record shall be incorporated therein by reference.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER

This matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the above-named appellants for an order permitting all Exhibits in the above-entitled cases, consisting of three bound volumes of white background photostatic copies of various documents, to be considered in their original form by this Court and not be printed in the record, and the Court having considered the said motion, the file and record herein, and the stipulation of all parties in support of said motion.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that all exhibits in the above-entitled cases may be considered in their original form and not be printed in the record.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien,
Clerk.

United States
Court of Appeals
for the Ninth Circuit

WILLIAM LESLIE KOHL,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY and
MORRISON-KNUDSEN COMPANY, INC., a corporation,
Appellees,

and

ARTHUR J. SESSING,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY and
MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellees.

Transcript of Record

Appeals from the District Court of the United States
for the Western District of Washington,
Northern Division

NOV 4 - 1948

Nos. 11985-11984

United States
Court of Appeals
for the Ninth Circuit

WILLIAM LESLIE KOHL,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY and
MORRISON-KNUDSEN COMPANY, INC., a corporation,
Appellees,

and

ARTHUR J. SESSING,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY and
MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellees.

Transcript of Record

Appeals from the District Court of the United States
for the Western District of Washington,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellant:

McMICKEN, RUPP & SCHWEPPE,
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Seattle 4, Washington.

Attorneys for Appellees:

GERALD DE-GARMO of Allen, Hilen,
Froude & DeGarmo,
1308-16 Northern Life Tower,
Seattle 1, Washington.

In the District Court of the United States for the
Western District of Washington, Northern Division

No. 1293

VERNON O. TYLER, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY and MORRISON-KNUDSEN, INC.
Defendants.

No. 1408

WILLIAM LESLIE KOHL, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

No. 1420

ARTHUR J. SESSING, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

MOTION FOR PERMISSION TO REOPEN
CAUSES FOR FURTHER PROCEEDINGS,
TO FILE AMENDMENTS TO ANSWERS
AND AFFIRMATIVE DEFENSES OF DE-
FENDANTS, AND TO INTRODUCE TESTI-
MONY IN SUPPORT THEREOF.

Comes now S. Birch & Sons Construction Com-
pany, a corporation, and Morrison-Knudsen Com-
pany, Inc., a corporation, defendants herein, and
respectfully [1*] move the above entitled Court for

* Page numbering appearing at foot of page of original
certified Transcript of Record.

permission to reopen the above entitled Causes for further proceedings, to file therein amendments to the Answers and Affirmative Defenses of the Defendants, to plead as further Affirmative Defenses to the plaintiffs' Complaints the following:

V.

That all contracts of employment between the plaintiff and these answering defendants, and all wages and salaries paid thereunder were approved and paid in good faith by defendants in conformity with and in reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit, the United States War Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

VI.

That any act or omission of defendants under the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, was in good faith and in the reasonable belief on the part of the defendants that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended.

And that the defendants be permitted by the Court to reopen the above entitled Causes, for the

purpose of [2] permitting defendants to introduce testimony in support of said additional defenses.

This Motion is based upon the files, records and proceedings herein, and upon the accompanying Affidavit of Gerald DeGarmo.

ALLEN, HILEN, FROUDE
& DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendants.

State of Washington,
County of King—ss.

Gerald DeGarmo, being first duly sworn, on oath deposes and says: That he is an Attorney at Law, a member of the law firm of Allen, Hilen, Froude & DeGarmo, and one of the attorneys for the defendants in the above entitled actions.

That the above entitled actions were heard as consolidated Causes for the purpose of trial in the above entitled Court, commencing on the 7th day of May, 1946, and as a result of said trial Findings of Fact, Conclusions of Law and Judgment were entered in each of said Causes on the 28th day of May, 1946. That thereafter, and within the time permitted by law, the defendants in said Causes appealed from said Judgments to the Circuit Court of Appeals for the Ninth Circuit, which appeal was heard upon briefs and oral argument by the Circuit Court of Appeals at San Francisco, California on the 15th day of May, 1947, and said Causes taken under advisement.

That on the 1st day of May, 1947, while said Causes were pending in the Circuit Court of Appeals for the Ninth Circuit, there was passed by [3] the House and Senate of the United States, and thereafter signed by the President of the United States, so as to become law on the 14th day of May, 1947, H. R. 2157, otherwise designated and known as the "Portal-to-Portal Act of 1947", which said Portal-to-Portal Act of 1947 contains, among others, the following provisions:

"Sec. 9. Reliance on Past Administrative Rulings, Etc.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or

rescinded or is determined by judicial authority to be invalid or of no legal effect.”

* * * *

“Sec. 11. Liquidated Damages.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the Court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act.”

That following the passage of the foregoing mentioned Portal-to-Portal Act of 1947 the defendants [4] herein, and appellants before the Circuit Court of Appeals for the Ninth Circuit, filed in said Appellate Causes, with the Circuit Court of Appeals for the Ninth Circuit, Motions to Remand said Causes to the above entitled Court for further proceedings, and in order to permit the defendants herein to take advantage of the Provisions of the Portal-to-Portal Act of 1947, heretofore quoted, which said Motions were heard by the Circuit Court of Appeals for the Ninth Circuit on the 7th day of July, 1947 and resulted in the entry of an Order by the Circuit Court of Appeals for the Ninth Cir-

cuit on the 15th day of September, 1947, a certified copy of which is on file in each of the above mentioned Causes, and which said Order provides as follows:

“Upon motion of appellants in the above entitled cases all of the said cases are hereby remanded to the trial courts whence they came with instructions that appropriate and proper proceedings be permitted in the referred to court whereby appellants may proffer pleadings to the effect that all defenses permitted by sections 9 and 10 of the Portal-to-Portal Act of 1947 are put in issue. We herewith make no decision or intimation as to the merits of the proffer.”

And that by Supplemental Order, dated October 13, 1947, said previous Order of September 15, 1947 was modified nunc pro tunc, as follows:

“Good cause appearing the order of this court of September 15th, 1947 wherein motions of appellants in the above entitled cases were granted remanding the said cases and that appropriate and proper proceedings be permitted in the trial courts to the end that appellants may proffer pleadings to the effect that all defenses permitted by Sections 9 and 10 of the Portal-to-Portal Act of 1947 are put in issue, is hereby amended nunc pro tunc so as to state Sections 9 and 11 of the said act instead of 9 and 10 thereof.” [5]

That a certified copy of said Order of October 13, 1947 is on file in each of the above entitled Causes.

That each of Sections 9 and 11, heretofore quoted,

is applicable to and constitutes a proper defense to the above entitled Causes, and that if permitted to interpose said defenses and introduce testimony in support thereof it can be shown by the defendants herein that in truth and in fact the defendants herein come within the purview of said statute and the provisions heretofore quoted.

GERALD DeGARMO.

Subscribed and sworn to before me this 15th day of October, 1947.

/s/ NORA E. GREENLAND,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Oct. 15, 1947. [6]

[Title of Court and Causes Nos. 1408-1420.]

ORDER UPON MOTIONS TO REOPEN
CAUSES FOR FURTHER PROCEEDINGS,
TO FILE AMENDMENTS TO ANSWERS
AND AFFIRMATIVE DEFENSES, AND
TO INTRODUCE TESTIMONY IN SUP-
PORT THEREOF.

This Cause having come on regularly for hearing on the 20th day of October, 1947, before the undersigned, one of the Judges of the above entitled Court, upon the Motions of the defendants in the above entitled Causes to reopen said Causes for further proceedings, to file amendments to the defendants' Answers and Affirmative Defenses and

to introduce testimony in support thereof; and said defendants having appeared by Gerald DeGarmo of Allen, Hilen, Froude & DeGarmo, their Counsel, and the plaintiffs having appeared by Mary Ellen Krug of McMicken, Rupp & Schweppe, their Counsel; and the Court having read and considered the Motions of the defendants and the Affidavits in support thereof, and the Affidavit of the Plaintiffs in resistance to said Motions, and having considered the files, records and proceedings herein and deeming itself fully advised in the premises: [7]

Now, Therefore, It Is Hereby Ordered that the Motions of the defendants herein, to file amendments to the Answers and Affirmative Defenses of the defendants herein and to introduce testimony in support thereof, be and the same are hereby granted in all particulars; conditioned, however, upon the terms that the defendants pay to the Attorneys for the plaintiffs, within fifteen (15) days from October 20, 1947, the sum of \$324.06 on account of out-of-pocket expense of the plaintiffs and their Counsel herein, and the sum of \$350.00 on account of Attorneys' fees, said sums to apply on account of the taxable and allowable costs and the allowances for Attorneys' fees respectively herein in the event of ultimate recovery by plaintiffs herein, but not to be repayable by plaintiffs or their Attorneys herein to defendants, or to be taxable as costs and disbursements by defendants, in the event of final judgment herein in favor of defendants, the said sums hereby or-

dered paid upon condition to be divided between the plaintiffs in the above entitled Causes in such manner as they may see fit and as may be determined between said plaintiffs and their Counsel herein, without obligation or duty on the part of defendants to see to such division and distribution between the plaintiffs.

The defendants except to that portion of the foregoing Order imposing terms and conditions, and the plaintiffs except to that portion of the foregoing Order granting the Motions of the defendants, and the exceptions are hereby allowed. [8]

Done In Open Court this 31st day of October, 1947.

JOHN C. BOWEN,
District Judge.

Approved as to form and notice of presentation waived. October 27, 1947.

McMICKEN, RUPP &
SCHWEPPE.

By MARY ELLEN KRUG.

Presented by

GERALD DeGARMO of Allen,
Hilen, Froude & DeGarmo,
Attorneys for Defendants.

[Endorsed]: Filed Oct. 31, 1947.

[9]

[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER AND AFFIRMATIVE DEFENSES

Come now the defendants herein, and for Supplemental Answer and Additional Affirmative Defenses to the Complaint of the plaintiff, in accordance with leave granted by Order of this Court, dated October 31, 1947, plead and allege as follows:

V.

That all contracts of employment between the plaintiff and these answering defendants, and all wages and salaries paid thereunder were approved and paid in good faith by defendants in conformity with and in reliance upon and administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit, the United States War Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

VI.

That any act or omission of defendants under the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, was in good faith and in the reasonable belief on the part of the defendants that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended. [10]

Wherefore, the defendants pray that the Complaint of the plaintiff herein may be dismissed with prejudice, and that the defendants may have and recover their costs herein.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendants.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 5, 1947. [11]

[Title of Court and Causes; 1408 and 1420.]

NOTICE OF CONSTITUTIONAL QUESTION

Come now the plaintiffs by their attorneys undersigned and request the Court to deny the defendants' motion to reopen, upon the ground that said motion is based upon an Act of Congress, namely, The Portal-to-Portal Act of 1947, 29 U.S. C. §§ 251-262, which act is unconstitutional as to these plaintiffs, and plaintiffs hereby notify the Court that in plaintiffs' opinion this case falls under Federal Civil Procedure Rule 24(c) providing that when the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the Court shall notify the Attorney

General of the United States as provided in the Act of Congress of August 24, 1937, c. 754, § 1.

McMICKEN, RUPP &
SCHWEPPE.

MARY ELLEN KRUG,
Attorneys for Plaintiffs.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 20, 1947.

[12]

[Title of Court and Cause.]

MOTION OF THE UNITED STATES TO INTERVENE AND FOR TIME WITHIN WHICH TO FILE BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT OF 1947.

Now comes the United States of America, by its Attorney General, and pursuant to the Act of August 24, 1937 (c. 754, Sec. 1, 50 Stat. 751, 28 U.S.C. Sec. 401), moves to intervene and become a party to this action for the purposes and with all the rights provided by said Act of August 24, 1937, upon the ground that the constitutionality of the Portal-to-Portal Act of 1947, approved May 14, 1947, has been drawn in question in this action, and neither the United States nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party hereto.

The United States further moves that the Court receive its pleading, entitled "Pleading of the United States in Intervention," which accompanies this motion in accordance with Rule 24(c) of the

Federal Rules of Civil Procedure, as its appearance in this action in support of the constitutionality of the said Portal-to-Portal Act of 1947, and in opposition to all pleadings, motions, and proceedings of any of the parties hereto, denying the validity of the said Act, or any part thereof, upon the ground that it is unconstitutional.

The United States moves also for leave to file a brief in support of the constitutionality of the said Portal-to-Portal [13] Act of 1947, within 30 days after service upon it of plaintiff's brief on the constitutional issue or such other time as the Court may deem reasonable.

TOM C. CLARK,

Attorney General.

By HERBERT A. BERGSON,

Acting Assistant

Attorney General.

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ FRANK PELLEGRINI,

Assistant United States

Attorney.

Of Counsel:

ENOCH E. ELLISON,

Special Assistant to the

Attorney General.

JOHANNA M. D'AMICO,

Attorney,

Department of Justice.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 11, 1947.

[14]

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES IN INTERVENTION

The United States of America, intervenor herein, for its pleading in intervention says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.

2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious question but if the Court should entertain serious doubts concerning the constitutionality of that Act, it should first consider the defenses raised by the defendant which are not based upon the Portal-to-Portal Act of 1947, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question. [15]

Wherefore, the United States of America prays that the Court enter a judgment herein which

shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947.

TOM C. CLARK,
Attorney General.

By /s/ HERBERT A. BERGSON,
Acting Assistant
Attorney General.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant
United States Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

JOHANNA M. D'AMICO,
Attorney,
Department of Justice.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 11, 1947.

[16]

[Title of District Court and Cause.]

SUPPLEMENTAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The foregoing Cause having been tried before the undersigned, one of the Judges of the above entitled Court, in May of 1946 upon the issues

as then presented by the pleadings, and Findings of Fact, Conclusions of Law and Judgment, in favor of the plaintiff and against the defendants, having been signed, filed and entered on the 28th day of May, 1946; and said Cause having been thereafter duly appealed by the defendants to the Circuit Court of Appeals for the Ninth Circuit, and having been thereafter remanded by said Court, without decision upon said appeal, to this Court by Order, signed, filed and entered September 15, 1947, as amended by Order, signed, filed and entered October 13, 1947; to permit of the defendants proffering pleadings to interpose the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947; and defendants thereafter having duly moved for and having been granted permission to reopen this Cause and to file amendments to their Answers and Affirmative Defenses herein, to plead the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947, and said amendments having been filed and [61] issue made thereon, and the issues as presented having been tried to the Court, and the Court having taken the Cause under advisement after the filing of briefs and having listened to the argument of counsel, and having heretofore orally announced its decision herein, and being fully advised in the premises; now, therefore, the the Court does hereby make the following Supplemental:

FINDINGS OF FACT

I.

All practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, in conformity with and in reliance on Administrative regulations, orders, rulings, approvals and' interpretations of the following agencies of the United States, to-wit, the United States War Department, the Corps of Engineers of the United States War Department, and the War Department Wage Administration Agency.

II.

All practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, and that the defendants had reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as Amended.

Done In Open Court this 2nd day of March, 1948.

JOHN C. BOWEN,

District Judge.

[62]

From the foregoing Findings of Fact the Court hereby deduces the following:

CONCLUSIONS OF LAW

I.

That the Portal-to-Portal Act of 1947 is, and Sections 9 and 11 thereof are, constitutional.

II.

That defendants are subject to no liability to the plaintiff for or on account of defendants' failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as Amended.

III.

That Paragraph 7 of the Findings of Fact, Paragraphs 3, 5 and 7 of the Conclusions of Law, and the Judgment, heretofore entered herein on the 28th day of May, 1946, in favor of plaintiff and against defendants, should be vacated, set aside and held for naught.

IV.

That the action of the plaintiff herein should be dismissed with prejudice, and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants, to be taxed in accordance with law and the rules of this Court.

Done In Open Court this 2nd day of March, 1948.

JOHN C. BOWEN,
District Judge.

Presented by

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO.

(Acknowledgment of Service.)

[Endorsed]: Filed March 2, 1948.

[63]

[Title of District Court and Cause.]

SUPPLEMENTAL JUDGMENT

The foregoing Cause having been tried before the undersigned, one of the Judges of the above entitled Court, in May of 1946 upon the issues as then presented by the pleadings, and Findings of Fact, Conclusions of Law and Judgment, in favor of the plaintiff and against the defendants, having been signed, filed and entered on the 28th day of May, 1946; and said Cause having been thereafter duly appealed by the defendants to the Circuit Court of Appeals for the Ninth Circuit, and having been thereafter remanded by said Court, without decision upon said appeal, to this Court by Order, signed, filed and entered September 15, 1947, as amended by Order, signed, filed and entered October 13, 1947, to permit of the defendants proffering pleadings to interpose the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947; and defendants thereafter having duly moved for and having been granted permission to reopen this Cause and to file amendments to their Answers and Affirmative Defenses herein, to plead the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947, and said amendments having been filed and issue made thereon, and the issues as presented having been tried to the Court, and the Court having taken the Cause under advisement after the filing of briefs and [64] having listened to the argument of counsel, and having heretofore orally announced its decision herein, and having made and entered

Supplemental Findings of Fact and Conclusions of Law; and the Court being fully advised:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that Paragraph 7 of the Findings of Fact, Paragraphs 3, 5 and 7 of the Conclusions of Law, and Judgment, heretofore signed, filed and entered herein on the 28th day of May, 1946, be and the same are hereby vacated, set aside and held for naught.

It Is Further Ordered, Adjudged and Decreed that the action of the plaintiff herein be and the same is hereby dismissed, with prejudice and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants and against the plaintiff, to be taxed in the manner provided by law and the rules of this Court.

Done In Open Court this 2nd day of March, 1948.

JOHN C. BOWEN,
District Judge.

Presented by:

ALLEN, HILEN, FROUDE, &
DeGARMO.

By GERALD DeGARMO.

(Acknowledgment of Service.)

[Endorsed]: Filed March 2, 1948.

[65]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that William Leslie Kohl, appellant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 2nd day of March, 1948.

McMICKEN, RUPP &
SCHWEPPE.

/s/ MARY ELLEN KRUG,
Attorneys for Appellant.

[Endorsed]: Filed April 21, 1948.

[66]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that Arthur J. Sessing, appellant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 2nd day of March, 1948.

/s/ McMICKEN, RUPP &
SCHWEPPE.

/s/ MARY ELLEN KRUG,
Attorneys for Appellant.

[Endorsed]: Filed April 21, 1948.

[66-a]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents: That we, William Leslie Kohl, the Appellant above named, as Principal, and the United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington as Surety, are held and firmly bound unto S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen, Inc., a corporation, the Appellees above named in the just and full sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of May, 1948.

The Condition of the Above Obligation Is Such, That if the said Appellant shall prosecute his appeal to effect and satisfy the judgment in full together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the Court may judge and award if he fails to make his plea good, then the

above obligation to be void, else to remain in full force and virtue.

By WILLIAM LESLIE KOHL.

/s/ MARY ELLEN KRUG,

Attorney for Appellant.

UNITED PACIFIC

INSURANCE COMPANY.

By /s/ GERRY L. WHITE,

Attorney-in-Fact.

[Endorsed]: Filed May 24, 1948.

[67]

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF TIME
TO FILE RECORD AND DOCKET CAUSE

It is hereby stipulated by and between the parties through their attorneys of record that the time within which the record of appeal must be filed and the action docketed in the Appellate Court may be extended to the 20th day of July, 1948.

McMICKEN, RUPP &
SCHWEPPE.

By MARY ELLEN KRUG,

Attorneys for Plaintiff,

Appellant.

ALLEN, HILEN, FROUDE &
DeGARMO.

By GERALD DeGARMO,

Attorneys for Defendants,

Appellees.

J. CHARLES DENNIS,

Attorney for United States of
America, Intervenor.

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME
IN WHICH TO FILE RECORD AND
DOCKET CAUSE

Whereas notice of appeal in the above-entitled cause was filed by the above-named plaintiff, appellant, on the 21st day of April, 1948, and the time for filing the record on appeal and docketing said action in the Appellate Court has not yet expired, now, therefore, said plaintiff, appellant, moves that this Honorable Court enter its order extending the time for filing the record on appeal and docketing the cause in the Appellate Court to the 20th day of July, 1948, which date is not more than ninety (90) days after the filing of the notice of appeal herein.

McMICKEN, RUPP & SCHWEPPE,
By MARY ELLEN KRUG.

[Endorsed]: Filed May 25, 1948. [69]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO FILE RECORD AND DOCKET CAUSE

This matter having come on to be heard this day before the undersigned Judge of the above-entitled Court on motion of the above-named plaintiff, appellant, and the stipulation of the parties hereto, and the Court having considered said mo-

tion and stipulation and being fully advised in the premises, and it appearing to the Court that the time for filing the record on appeal and docketing the action in the Appellate Court has not yet expired, and that the said motion is timely made, and good cause appearing therefore,

It Is Hereby Ordered, Adjudged and Decreed that the time for filing the record on appeal and docketing this action in the Appellate Court be and the same hereby is extended to the 20th day of July, 1948, which date is not more than ninety (90) days from the filing of the notice of appeal herein.

Done In Open Court this 25th day of May, 1948.

JOHN C. BOWEN,
Judge.

Order approved and notice of entry waived.

ALLEN, HILEN, FROUDE &
DeGARMO.

By GERALD DeGARMO,
Attorneys for Respondents.

Presented by:

MARY ELLEN KRUG.

[Endorsed]: Filed May 25, 1948.

[70]

In the District Court of the United States for the
Western District of Washington,
Northern Division

No. 1408

WILLIAM LESLIE KOHL,

Appellant,

vs.

S. BIRCH & SON CONSTRUCTION CO., a corporation,
and MORRISON-KNUDSEN CO.,
INC., a corporation,

Appellees,

UNITED STATES OF AMERICA,

Intervenor.

STATEMENT OF POINTS ON APPEAL

The appellant states that the points upon which he intends to rely upon appeal are the following:

1. The court erred in finding that all practices of the defendants, or any such practices, with respect to the payment of overtime compensation for all hours worked by the plaintiff-appellant in excess of forty (40) hours in any one work week were in good faith, in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretations of the following agencies of the United States, to-wit: The United States War Department, the Corps of Engineers of the United States War Department and the War Department Wage Administration Agency, or any agency of the United States.

2. The court erred in finding that all the prac-

tices of the defendants with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40)hours in any one work week, or any such practices, were in good faith, or that the defendants had reasonable grounds [71] for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as amended.

3. The court erred in finding that the defendants relied in good faith, or at all, upon anything except the contract which they had with the War Department of the United States (Exhibit 13).

4. The court erred in holding that Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947 are constitutional.

Dated at Seattle this 28th day of June, 1948.

McMICKEN, RUPP &
SCHWEPPE,
Attorneys for Appellant.

/s/ MARY ELLEN KRUG.

(Acknowledgment of Service.)

[Endorsed]: Filed June 29, 1948.

[72]

[Title of District Court and Cause.]

DESIGNATION OF RECORD CONTENTS
ON APPEAL

Plaintiff and appellant hereby designates the following portions of the record to be contained in the record on appeal in the above-entitled action:

1. Motion for Permission to Reopen Causes for Further Proceedings.

2. Order upon Motion to Reopen Causes for Further Proceedings.

3. Supplemental Answer and Affirmative Defenses.

4. Notice of Constitutional Question.

5. Motion of the United States to Intervene.

6. Pleading of the United States in Intervention.

7. Transcript of the Testimony.

8. Supplemental Findings of Fact and Conclusions of Law.

9. Supplemental Judgment.

10. Notice of Appeal. [73]

11. Costs Bond on Appeal.

12. Motion for Extension of Time to File Record and Docket Cause.

13. Order Granting Extension of Time.

14. Statement of Points on Appeal.

15. This Designation.

16. Stipulation Concerning Record on Appeal.

Dated at Seattle this 29th day of June, 1948.

McMICKEN, RUPP &
SCHWEPPE.

By MARY ELLEN KRUG,
Attorneys for
Plaintiff-Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed June 29, 1948.

[74]

In the District Court of the United States for the
Western District of Washington, Northern Division

No. 1420

ARTHUR J. SESSING, Appellant,
vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Appellees.

UNITED STATES OF AMERICA, Intervenor.

No. 1408

WILLIAM LESIE KOHL, Appellant,
vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Appellees,

UNITED STATES OF AMERICA, Intervenor.

No. 1293

VERNON O. TYLER, Appellant,
vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Appellees,

UNITED STATES OF AMERICA, Intervenor.

STIPULATION CONCERNING RECORD ON APPEAL

Whereas the above-entitled actions were, pur-
suant to stipulation of the parties, consolidated for
the purpose of trial and tried as consolidated cases

before the United States District Court for the Western District of Washington, Northern Division, and by reason thereof the testimony introduced upon such trial is applicable to all three actions, and

Whereas these actions were previously appealed to the Circuit Court of Appeals for the Ninth Circuit, bearing the numbers 11465, 11464 and 11463, respectively, and

Whereas during the pendency of said appeals the Portal-to-Portal Pay Act of 1947 was passed by the Congress of the United States, and

Whereas the United States Circuit Court of Appeals for the Ninth Circuit remanded the said cases to the United States District Court for the Western District of Washington for further proceedings to determine the applicability of the Portal-to-Portal Pay Act of 1947 to these causes of action, and

Whereas the present appeals in the above-entitled cases are from the determination of the United States District Court for the Western District of Washington with reference to the applicability of the Portal-to-Portal Pay Act of 1947 to the above-entitled actions, and

Whereas on the former appeals of these cases the transcript of the testimony introduced at the

trial was printed as a part of the record on appeal in the case of S. Birch & Sons Construction Company, a Corporation, and Morrison-Knudsen Company, Inc., a Corporation, appellants, vs. Vernon O. Tyler, appellee, No. 11463, and such transcript of testimony was not printed in the record on appeal in the other two causes set forth in the caption herein and a copy of a stipulation was [78] printed as a part of the record on appeal in the other two causes, and by such stipulation the transcript of testimony, as printed in cause number 11463 was incorporated in and by reference made a part of the record in causes numbered 11464 and 11465;

Now, Therefore, it is hereby stipulated by and between the parties through their attorneys of record:

That the records on the present appeals of the above-entitled causes shall embrace only matters occurring subsequent to the order of the Circuit Court of Appeals for the Ninth Circuit remanding said cases to the District Court for the further proceedings to determine the applicability of the Portal-to-Portal Pay Act of 1947; that for all matters occurring prior to said order the records on appeal in causes numbered 11463, 11464 and 11465 shall be and constitute the records in the present appeals; and

That the same procedure shall be followed in the present appeals as was followed in causes numbered 11463, 11464 and 11465, namely, the transcript of testimony introduced at the trial shall be printed as part of the record on appeal in Tyler, appellant, vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, appellees, and shall not be printed as a part of the record on appeal in Kohl vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, and Sessing vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, that in lieu of said transcript of testimony a copy of this stipulation shall be printed in Kohl vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, and in Sessing vs. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a [79] corporation, and the transcript of testimony as printed in Tyler vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, shall by this reference be adopted and incorporated as a part of the record in Kohl vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a cor-

poration, and in Sessing vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation.

Dated at Seattle this 29th day of June, 1948.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for Appellants
Kohl & Sessing.

WETTRICK, FLOOD &
O'BRIEN,

By GEORGE E. FLOOD,
Attorneys for Appellant, Tyler.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Appellees.

J. CHARLES DENNIS,
Attorney for United States of
America, Intervenor.

[Endorsed]: Filed June 29, 1948.

[80]

[Title of Court and Causes Nos. 1293-1420-1408.]

STIPULATION CONCERNING ORIGINAL
EXHIBITS

It Is Hereby Stipulated by and between the above named parties, through their undersigned counsel of record, that the Clerk transmit to the Circuit Court of Appeals of the Ninth Circuit all of the original exhibits introduced in the trial of the above entitled cause.

WETTRICK, FLOOD &
O'BRIEN,
GEORGE R. STUNTZ,

By GEORGE J. TOULOUSE, JR.,
Attorneys for Plaintiff and
Appellant, Tyler.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendants and
Appellees.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for Plaintiffs-
Appellants, Kohl & Sessing.

J. CHARLES DENNIS,
United States Attorney.

[Title of Court and Causes Nos. 1293-1420-1408.]

ORDER CONCERNING EXHIBITS
ON APPEAL

This matter having come on duly and regularly before the undersigned judge of the above entitled court upon the Stipulation of the parties hereto through their respective counsels of record, and it appearing to the court that the Stipulation is in order, now, therefore, it is by the court

Ordered that all the original exhibits introduced and admitted in evidence in the above entitled action be transmitted as a part of the record of the above entitled action on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of a transcript of said exhibits, by the Clerk of the court.

Done in open court this 9th day of July, 1948.

JOHN C. BOWEN,
District Judge.

Approved as to form and Notice of Entry waived.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendants and
Appellees.

Approved as to form and Notice of Entry
waived.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for Plaintiffs and
Appellants, Sessing and Kohl.

J. CHARLES DENNIS,
United States Attorney.

Presented by:

WETTRICK, FLOOD &
O'BRIEN,

By GEORGE J. TOULOUSE, JR.,

[Endorsed]: Filed July 9, 1948.

[84]

[Title of Court and Causes Nos. 1408-1420-1293-
1186-1628-1456]

STIPULATION

Whereas, the above-entitled actions were consolidated for the purposes of trial in the District Court and all testimony and all exhibits introduced in any one of the above-entitled cases was deemed to apply equally to all of the above-entitled cases, and

Whereas, the plaintiffs in the above-entitled cases have taken their appeals to the Circuit Court of Appeals for the Ninth Circuit,

Now, therefore, it is hereby stipulated by and between the parties, through their attorneys of record, that all the exhibits introduced on the trial of the above-entitled actions may be sent to the appellate court in the form in which they were introduced in lieu of copies.

Dated this 9th day of July, 1948.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for plaintiff appellants Kohl and Sessing.

WETRICK, FLOOD &
O'BRIEN,

By GEORGE E. FLOOD,
Attorneys for plaintiff appellant Tyler.

By GEORGE J. TOULOUSE, JR.

ZABEL, POTH & PAUL,

By FREDERICK PAUL,
Attorneys for plaintiff appellants Lassiter, Morrison and Naylor & Owen J. McNally.

ALLEN, HILEN, FROUDE
& DeGARMO,

By GERALD DeGARMO,
Attorneys for defendant appellees S. Birch & Sons
Construction Company and Morrison-Knudsen
Company, Inc.

BOGLE, BOGLE & GATES,

By ROBERT GRAHAM,
Attorneys for defendant appellee Guy F. Atkinson
Company.

MAURICE McMICKEN,
Attorney for defendant appellee West Contruction
Company.

J. CHARLES DENNIS,
Attorney for United States of America, Intervenor.

By FRANK PELLEGRINI,
Assistant United States Attorney.

[Endorsed]: Filed July 12, 1948. [87]

[Title of District Court and Cause No. 1408.]

ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBITS

This cause came on to be heard on motion of plaintiff appellant that the exhibits introduced at the trial of the above-entitled action shall be sent to the United States Circuit Court of Appeals for the Ninth Circuit in the form in which they were introduced in lieu of copies, and it appearing to the court that such original exhibits should be inspected by the appellate court;

Now, therefore, it is hereby ordered that the said exhibits shall be transmitted for exhibition to the United States Circuit Court of Appeals for the Ninth Circuit, subject to its further orders in regard thereto.

Done in open court this 12th day of July, 1948.

/s/ JOHN C. BOWEN,
Judge.

Presented by

MARY ELLEN KRUG.

Approved for entry:

WETTRICK, FLOOD &
O'BRIEN,

By GEO. J. TOULOUSE, JR.

Approved for entry:

ALLEN, HILEN, FROUDE
DeGARMO,

By G. DeGARMO,

Attys. for Appellees.
FRANK PELLEGRINI.

[Endorsed]: Filed July 12, 1948. [89]

[Title of Court and Cause No. 1408.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 89, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with the reporter's transcript of testimony and proceedings transmitted as a part hereof (with which testimony and proceedings there is consolidated the testimony and proceedings in our Causes No. 1186, H. A. Lasiter and W. R. Morrison vs. Guy F. Atkinson Company, No. 1293, Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen Co., No. 1420, Arthur J. Sessing vs. S. Birch & Sons Construction Company and Morrison-Knudsen Co., No. 1456, Raymond N. Naylor vs. West Construction Co., and No. 1628, Owen J. McNally vs. S. Birch & Sons Construction Company and Morrison-Knudsen Co.) constitute the record on appeal herein from the supplemental judgment of said United States District Court for the Western

District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees for making record, certificate or return: 72 pages at 40c, \$28.80; 17 pages at 10c (copies furnished), \$1.70; Notice of Appeal, \$5.00; Total, \$35.50.

I hereby certify that the above amount has been paid to me by the attorneys for the appellant.

In witness whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle in said District, this 15th day of July, 1948.

(Seal)

MILLARD P. THOMAS,
Clerk.

[Endorsed]: No. 11985-11984. United States Circuit Court of Appeals for the Ninth Circuit. William Leslie Kohl, Appellant, vs. S. Birch & Sons Construction Company and Morrison-Knudsen Company, Inc., a Corporation, Appellees, and Arthur J. Sessing, Appellant, vs. S. Birch & Sons Construction Company, and Morrison-Knudsen Company, Inc., a Corporation, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the Western District of Washington, Northern Division.

Filed: July 19, 1948.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11985

WILLIAM LESLIE KOHL, Appellant,
vs.

S. BIRCH & SONS CONSTRUCTION
COMPANY, et al., Appellees.

UNITED STATES OF AMERICA, Intervenor.

No. 11984

ARTHUR J. SESSING, Appellant,
vs.

S. BIRCH & SONS CONSTRUCTION
COMPANY, et al., Appellees.

UNITED STATES OF AMERICA, Intervenor.

ORDER

The above-entitled matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the appellants herein for an order that the stipulation concerning evidence and pre-trial order and the designated portions of the transcript of testimony may be printed in the case of Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen, Inc., No. 11983 only, and incorporated by reference in the other four cases, and the Court having considered the said motion, the file and record herein, and the stipulation of all parties in support thereof,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the stipulation concerning evidence and pre-trial order and the designated portions of the transcript of the testimony shall be printed in

the case of Vernon O. Tyler vs. S. Birch & Son Construction Company and Morrison-Knudsen, Inc., No. 11983 only and in the remaining cases a copy of the stipulation in support of the said motion shall be printed in lieu of such portions and such portions of the record shall be incorporated therein by reference.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Causes.]

ORDER

This matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the above-named appellants for an order permitting all Exhibits in the above-entitled cases, consisting of three bound volumes of white background photostatic copies of various documents, to be considered in their original form by this Court and not be printed in the record, and the Court having considered the said motion, the file and record herein, and the stipulation of all parties in support of said motion,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that all exhibits in the above-entitled

cases may be considered in their original form and not be printed in the record.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Causes.]

MOTION

Come now the appellants in the above-entitled cases and move that the record on appeal in said cases be printed solely in the case of Kohl vs. S. Birch & Sons Construction Company, et al., No. 11985; and that said record shall be entitled in both cases.

This motion is based on the stipulation of counsel attached hereto.

McMICKEN, RUPP & SCHWEPPE,
and MARY ELLEN KRUG,

By /s/ BERNARD REITER,
Attorneys for Appellants.

(Acknowledgment of Service.)

STIPULATION

Whereas, the pleadings and all matters of record in the two above-entitled cases are identical save only for the names of the parties and the amount of the judgment in each case; and,

Whereas, no useful purpose will be served by printing the record separately in each case;

Now, Therefore, it is hereby Stipulated by and between the parties, through their attorneys of record, that the record in the case of Kohl vs. S. Birch & Sons Construction Company, et al., No. 11985, shall be entitled in both of said cases and shall stand as the record in both of said cases and that it shall not be necessary to print the record in the case of Sessing vs. S. Birch & Sons Construction Company, et al., No. 11984.

It Is Further Stipulated that a copy of this stipulation shall be included in the record as printed in the case of Kohl vs. S. Birch & Sons Construction Company, et al., No. 11985.

Dated this day of, 1948.

McMICKEN, RUPP & SCHWEPPE,
and MARY ELLEN KRUG,

By /s/ BERNARD REITER,
Attorneys for Appellants.

ALLEN, HILEN, FROUDE &
DeGARMO,

By /s/ GERALD DeGARMO,
Attorneys for Appellees.

By /s/ FRANK PELLEGRINI,
One of Attorneys for Intervenor,
United States of America.

[Endorsed]: Filed September 7, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

ORDER

This matter having come on regularly for hearing before the undersigned judges of the above-entitled court upon motion of the appellants for an order to the effect that the record on appeal need not be printed in the case of Sessing vs. S. Birch & Sons Construction Company, et al., No. 11984; and that the record in the case of Kohl vs. S. Birch & Sons Construction Company, et al., No. 11985, shall be entitled in both of said cases;

Now, Therefore, It is hereby Ordered, Adjudged and Decreed that the record on appeal shall not be printed in the case of Sessing vs. S. Birch & Sons Construction Company, et al., No. 11984; and that the record in the case of Kohl vs. S. Birch & Sons Construction Company, et al., No. 11985 shall be entitled in both of said cases.

Done this 3rd day of September, 1948.

/s/ WILLIAM DENMAN,
Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed September 7, 1948. Paul P. O'Brien, Clerk.

No. 12017

United States
Court of Appeals
for the Ninth Circuit

H. A. LASSITER and W. R. MORRISON,
Appellants,
vs.

GUY F. ATKINSON COMPANY, a corporation,
and UNITED STATES OF AMERICA,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

NOV 4 - 1948

PAUL P. O'BRIEN, CLERK

No. 12017

United States
Court of Appeals

for the Ninth Circuit

H. A. LASSITER and W. R. MORRISON,
Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,
and UNITED STATES OF AMERICA,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

FREDERICK PAUL

of Zabel, Poth & Paul,
1912 Smith Tower,
Seattle, Washington,
Attorney for Appellants.

ROBERT GRAHAM

of Messrs. Bogle, Bogle & Gates,
603 Central Building,
Seattle, Washington,
Attorney for Appellant Guy F. Atkinson
Company, Appellee.

J. CHARLES DENNIS and

FRANK PELLEGRINI,

1017 U. S. Court House,
Seattle, Washington,

Attorneys for United States of America,
Appellee. [1*]

* Page numbering appearing at foot of page of original
certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 1186

H. A. LASSITER and W. R. MORRISON,
Plaintiffs,

vs.

GUY F. ATKINSON COMPANY, a corporation,
Defendant.

SUPPLEMENTAL ANSWER

Comes now the defendant, Guy F. Atkinson Company, a Nevada corporation, by and through its undersigned attorneys, Bogle, Bogle & Gates and Robert W. Graham, and amends its Amended Answer by adding thereto the following third defense and a fourth defense to each and every cause of action contained in the complaint herein save and accept the following causes of action:

Walter E. Skinner.....	No. 33
Thomas U. Dorsey.....	6
Wm. A. Clark.....	12
Paul H. Miller.....	21
Robert U. Tudor.....	26
F. F. McNamara.....	36

1. "Further answering said complaint and each and every cause of action and by way of a Third Affirmative Defense, defendant alleges that it is not subject to any liability or punishment for or on account of its failure to pay overtime compen-

sation as alleged for the reason that any act or omission of defendant herein alleged was in good faith, in conformity with, and in reliance on administrative regulations, orders, rulings, approvals or interpretations of any agency of the United States or administrative practices or endorsement policies of any agency of the United States with respect to the class of employers to which the defendant belongs. [2]

“Further answering said complaint and each and every cause of action and by way of a Fourth Affirmative Defense, the defendant further alleges that any act or omission complained of herein was in good faith and that the defendant had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act of 1938 as amended.”

This Supplemental Answer is filed pursuant to the “order on defendant motion to supplement its pleadings” entered herein by the Court on October 17, 1947.

BOGLE, BOGLE & GATES,
ROBERT GRAHAM,

Attorneys for Defendant, Guy F. Atkinson Company, a corporation.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 18, 1947. [3]

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES
IN INTERVENTION

The United States of America, intervenor herein, for its pleading in intervention says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.

2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious question but if the Court should entertain serious doubt concerning the constitutionality of that Act, it should first consider the defenses raised by the defendant which are not based upon the Portal-to-Portal Act of 1947, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question.

Wherefore, the United States of America prays that [4] the Court enter a judgment herein which

shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947.

TOM C. CLARK,
Attorney General.

By HERBERT A. BERGSON,
Acting Assistant Attorney
General.

J. CHARLES DENNIS,
United States Attorney.

FRANK PELLEGRINI,
Assistant United States
Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

JOHANNA M. D'AMICO,
Attorney, Department of
Justice.

(Acknowledgment of Service.)

[Endorsed]: Lodged Nov. 18, 1947.

[Endorsed]: Filed Nov. 24, 1947. [5]

[Title of District Court and Cause.]

ORDER ON DEFENDANT'S MOTION TO
SUPPLEMENT ITS PLEADINGS

The above entitled cause coming on before the
above entitled Court, the undersigned, one of the

judges of said Court presiding, this 11th day of October, 1947, and the defendant being represented by its attorneys, Bogle, Bogle & Gates and Robert W. Graham, and the plaintiffs being represented by their attorney, Frederick Paul, on defendant's motion to supplement its answer, and the Court having heard oral argument of the parties and having read the record heretofore made herein, and being fully advised in the premises, all and singular, now, therefore, it is by the Court hereby

Ordered, Adjudged and Decreed as follows:

1. That defendant's motion to reopen for further hearing and for leave to file a supplemental answer be, and the same is hereby, denied as to the following causes of action for the respective claimants:

Walter E. Skinner.....	No. 33
Thomas U. Dorsey.....	6
Wm. A. Clark.....	12
Paul H. Miller.....	21
Robert U. Tudor.....	26
F. F. McNamara.....	36

2. That the defendant's motion to reopen this case and to supplement its answer by pleading as follows:

(a) "Further answering said complaint and each and every cause of action therein contained and by way of a Third Affirmative Defense, defendant alleges that it is not subject to any liability [6] or punishment for or on account of its failure to pay overtime compensation as alleged for the reason that any

act or omission of defendant herein alleged was in good faith, in conformity with, and in reliance on administrative regulations, orders, rulings, approvals, or interpretations or administrative practices or enforcement policies of an agency of the United States with respect to the class of employers to which the defendant belongs.

(b) "Further answering said complaint and each and every cause of action therein contained and by way of a Fourth Affirmative Defense, the defendant further alleges that any act or omission complained of herein was in good faith and that the defendant had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended,"

be, and the same is hereby, granted as to each and every cause of action in which plaintiffs have heretofore herein recovered judgment against the defendant and in conformity with the mandate of the Circuit Court of Appeals for the Ninth Circuit, heretofore entered herein, except the six causes of action set forth in the paragraph immediately preceding this one, on the following terms and conditions:

(1) That the defendant pay forthwith to the attorneys for the plaintiffs the sum of \$600.00 as attorneys' fees, and \$560.00 as taxable costs, to be credited upon any such allowance made in favor of the plaintiffs and against the defendant upon final judgment of this case.

And it is further hereby

Ordered, Adjudged and Decreed that all evidence and each and every finding of fact, conclusion of law or judgment heretofore entered herein with respect to the issues presented by the supplemental answers of the defendant be, and the same are hereby, vacated and that the issues presented by the supplemental answer of the defendant be tried de novo.

Done in Open Court this 17th day of October, 1947.

JOHN C. BOWEN,
Judge.

Presented by

ZABEL, POTH & PAUL,
By FREDERICK PAUL,
Attorneys for Plaintiffs. [7]

(Verified.)

[Endorsed]: Filed Oct. 17, 1947.

[Title of District Court and Cause.]

STIPULATION CONCERNING RECORD
ON APPEAL

It is hereby stipulated between the above named parties, by their respective attorneys of record, as follows:

That the Stipulation and Pre-Trial Order Re Portal Act Hearing and the reporter's transcript of evidence and exhibits, heretofore transmitted to

the Circuit Court of Appeals for the Ninth Circuit in Tyler vs. S. Birch and Sons Construction Company, a corporation, et al., Number 1293, may be the Stipulation and Pre-Trial Order Re Portal Act Hearing and the reporter's transcript of evidence and exhibits in this cause, and in lieu thereof, a copy of the within stipulation and order shall be transmitted to the said Circuit Court of Appeals.

Dated at Seattle, Washington, this 26 day of July, 1948.

OSCAR A. ZABEL &
FREDERICK PAUL,

By /s/ FREDERICK PAUL,
Attorneys for Plaintiff.

BOGLE, BOGLE & GATES,

By /s/ ROBERT W. GRAHAM,
Attorneys for Defendant.

J. CHARLES DENNIS &
FRANK PELLEGRINI,

By /s/ FRANK PELLEGRINI,
Attorneys for the United
States of America.

It is so ordered this 27th day of July, 1948.

/s/ LLOYD L. BLACK,
United States District Judge.

[Endorsed]: Filed July 27, 1948. [9]

[Title of District Court and Cause.]

SUPPLEMENTAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The foregoing cause having been tried before the undersigned, one of the Judges of the above entitled Court, in October of 1945, upon the issues as then presented by the pleadings, and Findings of Fact, Conclusions of Law and Judgment, in favor of the plaintiffs and against the defendant, having been signed, filed and entered on the 9th day of November, 1945; and said cause having been thereafter duly appealed by both the plaintiffs and the defendant to the Circuit Court of Appeals for the Ninth Circuit; and said Court having entered its judgment herein on May 28, 1947, and thereafter pursuant to defendant's Motion for Order Modifying Judgment Remanding Case to District Court and Directing Reopening Case for Further Proceedings having entered an order on July 28, 1947, vacating its judgment of May 28, 1947, reinstating defendant's appeal as to certain counts of the complaint and remanding this cause to this Court as to all counts on which this Court had heretofore entered judgment against the defendant with power to consider any matters presented to it under the Portal-to-Portal Act of 1947; and the defendant thereafter having duly moved for and having been granted permission by order of this Court dated October 17, 1947, to reopen this cause and to file amendments to its Answer and Affirmative Defenses to certain causes of action

herein by pleading the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947 and said Supplemental Answer having therefore been filed on October 18, 1947; and a trial thereafter on the issues made having been had on December 8, 1947, and the Court having taken the cause under advisement after the filing of briefs and arguments of counsel and having heretofore orally announced its decision herein and being fully advised in the premises;

Now, Therefore, the Court does hereby make the following Supplemental:

FINDINGS OF FACT

I.

All practices of the defendant with respect to the payment of overtime compensation for all hours worked by the plaintiffs or plaintiff's assignors in excess of forty (40) hours in any one week were in good faith in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretations of the following agencies of the United States, to-wit: The United States War Department, The Corps of Engineers of the United States War Department and the War Department Wage Administration Agency.

II.

All practices of the defendant with respect to the payment of overtime compensation for all hours worked by the plaintiffs or plaintiff's assignors in excess of forty (40) hours in any one week were in good faith and that the defendant had

reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1938 as amended. [11]

Done in Open Court this 2nd day of March, 1948.

JOHN C. BOWEN,
District Judge.

Presented by:

ROBERT W. GRAHAM,
Attorney for Defendant.

From the foregoing Findings of Fact the Court hereby makes the following:

CONCLUSIONS OF LAW

I.

The Portal-to-Portal Act of 1947 is, and Sections 9 and 11 thereof are, constitutional.

II.

The defendant is subject to no liability to the plaintiffs or plaintiff's assignors for or on account of defendant's failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended.

III.

That paragraph LVI of the Findings of Fact, paragraphs V, VII and IX through XV both inclusive and the Judgment heretofore entered herein on the 9th day of November, 1945, in favor of plaintiffs and against defendant except insofar as they relate to the following causes of action:

Walter E. Skinner.....	No. 33
Thomas U. Dorsey.....	6
Wm. A. Clark.....	12
Paul W. Miller.....	21
Robert U. Tudor.....	26
F. F. McNamara.....	36

should be vacated, set aside and held for naught.

IV.

That the action of the plaintiffs save and except so much thereof as relates to the causes of action set forth in Conclusion of Law numbered III above should be dismissed with prejudice and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendant, to be taxed in accordance with law and the rules of this Court.

Done in Open Court this 2nd day of March, 1948.

JOHN C. BOWEN,
Judge.

Presented by:

ROBERT W. GRAHAM,
Attorney for Defendant.

[Endorsed]: Filed March 2, 1948. [13]

In the United States District Court for the Western District of Washington, Northern Division

No. 1186

H. A. LASSITER and W. R. MORRISON,
Plaintiffs,

vs.

GUY F. ATKINSON COMPANY, a Nevada
corporation,
Defendant.

SUPPLEMENTAL JUDGMENT

The foregoing cause having been tried before the undersigned, one of the Judges of the above entitled Court, in October of 1945, upon the issues as then presented by the pleadings, and Findings of Fact, Conclusions of Law and Judgment, in favor of the plaintiffs and against the defendant, having been signed, filed and entered on the 9th day of November, 1945; and said cause having been thereafter duly appealed by both the plaintiffs and the defendant to the Circuit Court of Appeals for the Ninth Circuit; and said Court having entered its judgment herein on May 28, 1947, and thereafter pursuant to defendant's Motion for Order Modifying Judgment Remanding Case to District Court and Directing Reopening Case for Further Proceedings having entered an order on July 28, 1947, vacating its judgment of May 28, 1947, reinstating defendant's appeal as to certain counts of the complaint and remanding this cause to this Court as to all counts on which this Court

had heretofore entered judgment against the defendant with power to consider any matters presented to it under the Portal-to-Portal Act of 1947; and the defendant thereafter having duly moved for and having been granted permission by order of this Court dated October 17, 1947, to reopen this cause and to file amendments to its Answer and Affirmative defenses to certain causes of action herein by pleading the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947 and said Supplemental Answer having therefore been filed on October 18, 1947; and a trial thereafter on the issues made having been had on December 8, 1947, and the Court having taken the cause under advisement [14] after the filing of briefs and arguments of counsel and having made and entered Supplemental Findings of Fact and Conclusions of Law and the Court being fully advised; now, therefore, it is

Ordered, Adjudged and Decreed that paragraph LVI of the Findings of Fact, paragraphs V, VII, and IX through XV both inclusive and the Judgment heretofore entered herein on the 9th day of November, 1945, in favor of plaintiffs and against defendant except insofar as they relate to the following causes of action:

Walter E. Skinner.....	No. 33
Thomas U. Dorsey.. .. .	6
Wm. A. Clark.....	12
Paul N. Miller.....	21
Robert U. Tudor.....	26
F. F. McNamara.....	36

should be vacated, set aside and held for naught.

It Is Further Ordered, Adjudged and Decreed that the action of the plaintiffs save and except so much thereof as relates to the causes of action enumerated in the next preceding paragraph above be and the same is hereby dismissed, with prejudice and with costs incurred subsequent to the filing of the supplemental answer in favor of the defendant and against the plaintiff, to be taxed in the manner provided by law and by the rules of this Court.

Done in Open Court this 2nd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

/s/ ROBERT GRAHAM,
Of Bogle, Bogle & Gates,
Attorneys for Defendant.

(Entered on Civil Docket March 2, 1948.)

[Endorsed]: Filed March 2, 1948. [15]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Guy F. Atkinson Company, a corporation, defendant, and to Robert W. Graham, Attorney for Defendant, United States of America, Intervener, and to J. Charles Dennis and Frank Pellegrini, Attorneys for Intervener.

Notice Is Hereby Given that the above named plaintiffs appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, and the whole thereof, involved in all Causes of Action entered in the above named action on the 2nd day of March, 1948, and which is now final.

Dated at Seattle, Washington, this 27th day of April, 1948.

ZABEL, POTH & PAUL and
FREDERICK PAUL,

By FREDERICK PAUL,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 30, 1948. [16]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men by These Presents:

That I, W. R. Morrison and H. A. Lassiter, one of the plaintiffs above named, as principal of the National Surety Corporation, a corporation, organized under the laws of the State of New York, and authorized to transact business of surety in the State of Washington, as surety, are held and firmly bound unto Guy F. Atkinson Company, a Nevada corporation, the defendant named in the above entitled action, and United States of America, Intervenor, in the just and full sum of \$250.00, for which sum well and true to be paid, we bind ourselves, our and each of our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of July, 1948.

The condition of this obligation is such:

That, Whereas, the above named defendant on the 2nd day of March, 1948, in the above entitled action and Court, recovered judgment against the plaintiffs above named; and,

Whereas, the above named principal has heretofore given [17] due and proper notice that they appeal from said judgment of the above entitled Court to the Circuit Court of Appeals for the Ninth Circuit;

Now, Therefore, if the said principal, W. R. Morrison, shall pay to Guy F. Atkinson Company, a Nevada corporation, and to United States of

America, all costs and damages that may be awarded against said defendant and intervenor on the appeal, or on the dismissal thereof, not to exceed the sum of \$250.00, and shall satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the United States Circuit Court of Appeals, for the Ninth Circuit, may render, or make, or order to be rendered, or made by the above entitled Court, then this obligation to be void; otherwise, to remain in full force and effect.

W. R. MORRISON, and
H. A. LASSITER,

By FREDERICK PAUL,
One of His Attorneys.

NATIONAL SURETY
CORPORATION,

(Seal) By /s/ MILDRED PALITZKE,
Attorney-in-Fact.

[Endorsed]: Filed July 15, 1948. [18]

[Title of Court and Causes Nos. 1186, 1293, 1628.]

ORDER TO EXTEND TIME TO FILE
RECORD AND DOCKET ACTION

These causes coming on for hearing on motion to extend the time within which to file a record on appeal and to docket the actions with the Circuit Court of Appeals for the Ninth Circuit, until

the 20th day of July, 1948, and good cause appearing therefor, it is hereby

Ordered that the time for the filing for the record on appeal and docketing of the actions in the Circuit Court of Appeals for the Ninth Circuit by the parties hereto, be, and the same is hereby, extended to and including the 20th day of July, 1948.

Done in Open Court this 28th day of May, 1948.

JOHN C. BOWEN,
U. S. District Judge.

Presented by:

FREDERICK PAUL,
Attorney for Plaintiffs.

Approved:

BOGLE, BOGLE & GATES,
By J. TYLER HULL,
Attorney for Guy F. Atkinson
Co.

Approved:

ALLEN, HILEN, FROUDE &
DeGARMO,
By GERALD DeGARMO,
Attorney for S. Birch & Sons Constr. Co. and
Morrison-Knudsen Co.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 1186

H. A. LASSITER, et al.,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,
Appellee.

UNITED STATES OF AMERICA,
Intervenor.

STIPULATION AND ORDER EXTENDING
TIME TO FILE AND DOCKET CAUSE

Whereas, in the above entitled case, the appellants have filed their notice of appeal to the above entitled court, and

Whereas, the record on appeal in said cause is seven hundred pages long, and

Whereas, the order to the court reporter to transcribe the record was timely given; and

Whereas, the record has just been received and cannot be processed through the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, prior to the expiration of the time allowed by law to file and docket the same in the above entitled court. [20]

Now, Therefore, it is hereby stipulated by and between the above named parties through their

respective attorneys that the time to file and docket the said cause may be extended to, on or before August 15, 1948.

Dated at Seattle, Washington, this 12th day of July, 1948.

BOGLE, BOGLE & GATES,
By /s/ ROBERT W. GRAHAM,
Attorneys for Appellees.

OSCAR A. ZABEL &
FREDERICK PAUL,
By /s/ FREDERICK PAUL,
Attorneys for Appellant.

It is so ordered this 19th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
United States Circuit Judge.

A true copy. Attest: July 19, 1948. Paul P. O'Brien, Clerk. (Seal)

[Endorsed]: July 19, 1948. Filed. Paul P. O'Brien, Clerk.

[Endorsed]: Filed July 21, 1948. Millard P. Thomas, Clerk. [21]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The plaintiffs state that the points upon which they intend to rely upon appeal are the following:

1. The court erred in finding, concluding, and adjudging that all practices of the defendant, or any such practices, with respect to the payment of overtime compensation for all hours worked by the plaintiffs in excess for forty (40) hours in any one work week were in good faith, in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretations of the following agencies of the United States, to-wit: The United States War Department, the Corps of Engineers of the United States War Department and the War Department Wage Administrative Agency, or an agency of the United States.

2. The court erred in finding, concluding, and adjudging that all the practices of the defendant with respect to the payment of overtime compensation for all hours worked by the plaintiffs in excess of forty (40) hours in any one work week, or any such practices, were in good faith, or that the defendant had reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1948, as amended. [22]

3. The court erred in finding, concluding, and adjudging that the defendant relied in good faith, or at all, upon anything except the contract which

they had with the War Department of the United States.

4. The court erred in holding that Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947 are constitutional.

Dated at Seattle this 12th day of July, 1948.

OSCAR A ZABEL &
FREDERICK PAUL,

By FREDERICK PAUL,
Attorneys for Plaintiff.

(Acknowledgment of Service.)

[Endorsed]: Filed July 27, 1948. [23]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Plaintiffs hereby designate the following portions of the record to be contained in the record on appeal in the above entitled action:

1. Supplemental Answer and Affirmative Defense

2. Pleading of the United States in Intervention

2a. Order on Defendant's Motion to Supplement Its Pleadings

3. Stipulation and Order Concerning Record on Appeal

4. Supplemental Findings of Fact and Conclusions of Law

5. Supplemental Judgment
6. Notice of Appeal
7. Cost Bond on Appeal
8. Order Granting Extension of Time to File
Record and Docket Cause
9. Statement of Points on Appeal
10. This Designation

Dated at Seattle this 12th day of July, 1948.

OSCAR A. ZABEL &
FREDERICK PAUL,

By FREDERICK PAUL,
Attorneys for Plaintiff.

(Acknowledgment of Service.)

[Endorsed]: Filed July 27, 1948. [24]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 24, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the Office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the supplemental judgment of said United States District Court for

the Western District of Washington filed and entered on March 2, 1948, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my [25] office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees: 4 pages at 40c, \$1.60; 18 pages at 10c, \$1.80; Notice of Appeal, \$5.00; total, \$8.40.

I hereby certify that the above amount has been paid to me by the attorney for the appellant.

In witness whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 9th day of August, 1948.

(Seal)

MILLARD P. THOMAS,
Clerk.

[Endorsed]: No. 12017. United States Court of Appeals for the Ninth Circuit. H. A. Lassiter and W. R. Morrison, Appellants, vs. Guy F. Atkinson Company, a corporation, and United States of America, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed August 11, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 12017

H. A. LASSITER, et al.,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,
Appellee.

UNITED STATES OF AMERICA,

Intervenor.

ORDER

The above-entitled matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the appellants herein for an order that the stipulation concerning evidence and pre-trial order and the designated portions of the transcript of testimony may be printed in the case of Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen, Inc., No. 11983, only, and incorporated by reference in the other four cases, and the Court having considered the said motion, the file and record herein, and the stipulation of all parties in support thereof,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the stipulation concerning evidence and pre-trial order and the designated portions of the transcript of the testimony shall be printed in the case of Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen, Inc., No. 11983 only and in the remaining cases a copy of the

stipulation in support of the said motion shall be printed in lieu of such portions and such portions of the record shall be incorporated therein by reference.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER

This matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the above-named appellants for an order permitting all Exhibits in the above-entitled cases, consisting of three bound volumes of white background photostatic copies of various documents, to be considered in their original form by this Court and not be printed in the record, and the Court having considered the said motion, the file and record herein, and the stipulation of all parties in support of said motion.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that all exhibits in the above-entitled cases may be considered in their original form and not be printed in the record.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien,

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF PORTION OF RECORD
TO BE PRINTED

The above named appellants hereby designate the entire record heretofore transmitted to the Court in this action be printed together with this designation, adoption of statement of points on appeal, and a stipulation and order of record on appeal heretofore filed in the above entitled Court.

/s/ FREDERICK PAUL,
Attorney for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed August 24, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ADOPTION OF STATEMENT OF POINTS
ON APPEAL

The above named appellants hereby adopt statement of points on appeal heretofore filed in the District Court in this cause.

/s/ FREDERICK PAUL,
Attorney for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed August 24, 1948. Paul P. O'Brien, Clerk.

United States
Court of Appeals
for the Ninth Circuit

OWEN J. McNALLY,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a
corporation, MORRISON - KNUDSEN CO., a
corporation, and
UNITED STATES OF AMERICA,
Appellees.

Transcript of Record

Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

NOV 4 - 1948

PAUL P. O'BRIEN, /

No. 12018

United States
Court of Appeals
for the Ninth Circuit

OWEN J. McNALLY,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a
corporation, MORRISON - KNUDSEN CO., a
corporation, and

UNITED STATES OF AMERICA,

Appellees.

Transcript of Record

Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

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Attorney for Appellants.

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Construction Co., and Morrison-Knudsen
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Seattle, Washington. [1*]

Attorneys for Appellee
United States of America,

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington, Northern
Division

Civil Action No. 1628

OWEN J. McNALLY,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, a corporation,
Defendants.

COMPLAINT

I.

Plaintiff brings this action to recover from the defendants unpaid overtime compensation, and an additional equal amount of liquidated damages on his own behalf; that he also brings this action on behalf of other employees, and former employees similarly situated, who may hereafter join in this action, all pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, (Pub. No. 728, 75th Congress; 52 Stat. 1060), hereinafter referred to as the Act.

II.

Jurisdiction is conferred on the Court by Section 14 (8), 28 U.S.C.A. (Judicial Code) 24 giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce," without regard to the citizenship of the

parties, or the value or sum, in controversy, and by Section 16 (b) of the Act.

III.

That the defendant S. Birch & Sons Construction Company is a Montana corporation, doing business under said name and style, and Morrison-Knudsen Company, Inc., is a corporation organized and existing under the laws of the State of Delaware, and qualified [2] to do business in the State of Washington; and, that said defendants under the name and style of S. Birch & Sons Construction Company and Morrison-Knudsen Company, Inc., were, and now are, engaged in the purchasing and using, selling and furnishing of materials, equipment and supplies in interstate commerce for the building of camps and bases in the Territory of Alaska; that the material, equipment and supplies were purchased at various places, both within and without the Territory of Alaska and the State of Washington, and shipped in interstate commerce to Alaska for use; that substantially all of said materials, equipment and supplies were produced for interstate commerce, and have been purchased, sold, offered for transportation, transported, shipped or delivered in interstate commerce from various points within and without the State of Washington and other States to Alaska and from Alaska to other States.

IV.

That during the work weeks beginning 1943 to this date, defendants have employed a large number of men and women in the buying, selling and

transporting of said materials, equipment and supplies in Alaska, doing clerical, office, bookkeeping and accounting work necessary for the buying, selling and transporting of said materials, equipment and supplies, and in keeping payrolls and other records of other employees located in the Territory of Alaska, all in interstate commerce; that during said period, the defendants, who are engaged in the buying, selling and transporting of goods in interstate commerce, or engaged in operations necessary to the production of goods for interstate commerce within the meaning of the Act, employed the plaintiff and other employees similarly situated, who may hereafter join in this suit, to perform duties constituting an essential part of the handling and the buying, selling and transporting in [3] interstate commerce of defendant's goods without compensating them for overtime as provided by said Act; that the goods purchased, sold and transported by such employees, during such period, have been produced for interstate commerce and have been sold, offered for transportation, transported, shipped or delivered in interstate commerce from various points within the various States of the United States to Alaska, and to and from the scene of operations where the plaintiff and employees were employed.

V.

That in such business the defendants have employed the plaintiff, in the various duties and for the time described in their various causes of action hereinafter alleged; and, that the functions per-

formed by the plaintiff, are an essential part of the handling, selling and transporting of defendants' goods, and they were transported and delivered in interstate commerce; and, that the performance of such duties constitute engaging in commerce within the meaning of the Act.

VI.

That during such period, defendants employed plaintiff and other employees similarly situated, in the buying, selling, handling and transporting, or in occupations necessary to the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, for work weeks longer than the applicable maximum number of hours under Section 7 of the Act, and failed and refused to compensate him for such employment in excess of such applicable maximum hours in such work week, at rates not less than one and one-half times the regular rates at which they were employed; that the employment of the plaintiff and former employees, and others similarly situated for work weeks in excess of the applicable maximum hours under Section 7 of the Act, without compensating them for such excess hours at [4] rates not less than one and one-half times the regular hourly rates at which they were, or are, employed, was in violation of Section 7 of the Act.

VII.

That during periods alleged defendants employed the plaintiff, and other employees, and former employees hereafter to be named, in its said operations, as aforesaid, in excess of forty hours during

each work week and paid wages to the plaintiff and other employees, on the basis of the straight hourly rate for forty-eight hours per week; that under the provisions of Section 7 of the Act, plaintiff and former employees should have received an additional one-half time for all overtime hours worked between forty and forty-eight hours, and time and one-half for all overtime hours worked in excess of forty-eight hours per week, exclusive of the 7th day.

VIII.

That from September 24, 1944, to and including October 13, 1945, the defendants employed the plaintiff as storekeeper, whose duties consisted of working in the warehouse office, typing equipment inspection reports, material requisitions, letters relative to baggage and shipment, checking and labeling baggage and records, typing final reports, packing and shipping records, repairing and typing receiving reports, checking shipments, receiving shipments, preparing and typing manifests, typing, receiving and inspecting reports, checking other employees' baggage, typing miscellaneous letters addressed to Continental United States, all being connected with the interstate operations and transactions as alleged in Paragraph II, III, IV, V, VI and VII, inclusive, and who is also engaged in an occupation necessary to the movement of goods in interstate commerce, and is engaged in the construction of an instrumentality of interstate commerce which had theretofore [5] been used, and was being used, in interstate commerce;

and, that as such employee the plaintiff was engaged in interstate commerce or in the production of goods for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938; and, that he worked regularly from September 24, 1944, to and including October 13, 1945, and by reason thereof the defendants became indebted to the plaintiff for a total of three hundred forty-four overtime hours at the one-half time rate, and five hundred sixteen overtime hours at the time and one-half rate, as alleged in Paragraph VII, but that said defendants, the employers, compensated him for his work at a rate which was less than one and one-half times his regular hourly rate at which he was employed, and by reason thereof, the defendants became indebted to the said Owen McNally, in the sum of fourteen hundred seventy-five dollars and eighty-eight cents (\$1475.88), no part of which has been paid; that the Fair Labor Standards Act of 1938 further provides in Section 16 (b) thereof, that any employer who so violates the provisions of said Act, shall be liable to any employee affected in the amount of the said unpaid overtime compensation, and in an additional equal amount as liquidated damages, and shall be liable for a reasonable attorney's fee and costs of said action; that the sum of \$750.00 is a reasonable attorney's fee on said claimant's cause of action.

Wherefore, Plaintiff prays for judgment against the defendants as follows:

1. In the amount of \$2,951.76 for the unpaid overtime compensation and liquidated damages, to-

gether with \$750.00 as a reasonable attorney's fee.

2. For his costs and disbursements herein to be taxed.

OSCAR A. ZABEL,
FREDERICK PAUL,
Attorneys for Plaintiff.

[Endorsed]: Filed [Illegible].

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES

Come now the defendants, S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, a corporation, and for answer to the Complaint of the plaintiff herein, admit, deny and allege as follows:

I.

For answer to Paragraph I of the plaintiff's Complaint, admit that the plaintiff brings this action to recover from the defendants claimed unpaid overtime compensation, and an additional equal amount of liquidated damages on his own behalf, pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Pub. No. 728, 75th Congress; 52 Stat. 1060); and deny each and every other allegation in said paragraph contained.

II.

Deny each and every allegation as contained in Paragraph II of the plaintiff's Complaint, and the whole of said Paragraph.

III.

For answer to Paragraph III of the plaintiff's Complaint, admit that the defendant, S. Birch & Sons [7] Construction Company, is a Montana corporation, doing business under said name and style, and Morrison-Knudsen Company, Inc., is a corporation organized and existing under the laws of the State of Delaware and qualified to do business in the State of Washington; and deny each and every other allegation in said paragraph contained not herein expressly admitted.

IV.

Deny each and every allegation as contained in Paragraph IV of the plaintiff's Complaint, and the whole of said paragraph.

V.

For answer to Paragraph V of the plaintiff's Complaint, admit that the defendants have employed the plaintiff at various times and in various duties; and deny each and every other allegation in said paragraph contained not herein expressly admitted.

VI.

Deny each and every allegation as contained in Paragraph VI of the plaintiff's Complaint, and the whole of said paragraph.

VII.

Deny each and every allegation as contained in Paragraph VII of the plaintiff's Complaint, and the whole of said paragraph.

VIII.

Deny each and every allegation as contained in

Paragraph VIII of the plaintiff's Complaint, and the whole of said paragraph.

And by way of further answer to the plaintiff's Complaint, and as an affirmative defense thereto, these [8] answering defendants allege:

I.

That the plaintiff herein, during his employment by these answering defendants, was not engaged in commerce or in the production of goods for commerce, and hence was not subject to the provisions of the Fair Labor Standards Act of 1938, as Amended.

II.

That during the entire time of the employment of the plaintiff by the defendants, as referred to in the plaintiff's Complaint herein, said plaintiff was employed by the defendants in a bona fide administrative capacity, and hence the plaintiff was not subject to and was covered by the exemptions as contained within the Fair Labor Standards Act of 1938, as Amended.

III.

That in accordance with the terms and provisions of the written Employment Agreements between plaintiff and these answering defendants, copies of which are attached hereto as Exhibits "A" and "B", and are by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein, the "base compensation" rate of pay of the plaintiff covered all hours worked in the first six (6) days of a work-week, and accordingly the total

number of hours worked in the first six (6) days of each week should be used in computing the hourly wage rate for such work under the Fair Labor Standards Act of 1938, as Amended.

IV.

That in accordance with the terms and provisions of the written Employment Agreements between the plaintiff [9] and these answering defendants, copies of which are attached hereto as Exhibits "A" and "B", and are by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein, all Class "B" employees, of which the plaintiff was one, were paid double-time for all hours worked on the seventh (7th) day of each work-week, and that these answering defendants are entitled to an offset in credit against any overtime compensation allowed the plaintiff under the Fair Labor Standards Act of 1938, as Amended, of one fourth ($\frac{1}{4}$ th) of the total double-time payments.

Wherefore, having fully answered the Complaint of the plaintiff herein, these answering defendants pray that said action may be dismissed with prejudice, and that they may have and recover their costs herein.

ALLEN, HILEN, FROUDE & DeGARMO.

By /s/ GERALD DeGARMO,
Attorneys for Defendants, S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, a corporation.

EXHIBIT "A"

S. Birch & Sons Construction Co. and Morrison-Knudsen Company, Inc.

Contracts W-45-108-eng-500, 501, 502
Cost-Plus-A-Fixed-Fee

CONTRACTORS' UNIFORM CONTRACT OF
EMPLOYMENT APPLYING TO

Non-Manual

Employees of Fixed Fee Contractors Employed in
the Continental United States or in Alaska for
Work in Alaska.

This Agreement, made this 24th day of September, 1944, by and between S. Birch & Sons Construction Co. and Morrison Knudsen Company, Inc., of Seattle, State of Washington, the Contractors under Contracts No. W45-108-eng-500, 501, 502 with the War Department requiring among other things, performance of certain work in Alaska, hereinafter called the "Contractor," and Owen J. McNally, of New York City, State of New York, who has applied to the Contractor for employment under said contract, hereinafter called the "Employee."

Witnesseth That the parties have and do hereby agree as follows:

Article 1. Assignment of Work.

Effective on the date hereof and subject to all the terms and conditions of this Agreement, the Em-

ployee hereby accepts employment by the Contractor as Storekeeper for service as such in connection with said contract. The Employee's initial assignment is to work in that capacity at Aleutian Islands Area. The Employee agrees that his services may be used at any other location in Alaska designated by the Contractor. In the event the Contractor may require the Employee to render service in any other capacity than that designated above, either for the Contractor or for others, the Employee shall perform the work assigned to the full extent of his ability. The Employee warrants that all the statements made in his application for employment are true.

Article 2. Compensation.

a. Base Compensation. The Employee is employed at a "base compensation" rate of \$70.00 per week (United States currency) payable by check or currency as the Contractor may desire. Unless otherwise directed by the Employee in writing, subject to the approval of the Contractor, all compensation payments shall be made to the Employee at the site of the work. Base compensation shall commence on the above date. Compensation shall be subject to deduction of any indebtedness owed to the Contractor, for Social Security Tax and other deductions required by the law, if applicable, and shall be subject to such deductions as may be provided by regulations of the Contractor and approved by the Contracting Officer under the contract described above, hereinafter called the "Contracting Officer." If the Contractor requires

the Employee to render service in any other capacity than that designated in Article 1, the base compensation to be paid the Employee will be that stipulated in this Section a, except that if such work is in a higher compensation classification, the Employee shall be paid such higher compensation during the time he is working at such other work. If the Employee is not qualified to perform the work stipulated in Article 1, the parties hereto may agree upon his assignment to work carrying a lower base compensation classification and that he is to be paid the base compensation carried by the lower classification, in which event this Agreement will be modified in writing accordingly.

b. Subsistence. Employees shall be furnished subsistence and quarters at the place of work assignment at a charge not to exceed \$1.50 per day, payroll deductions for which are hereby authorized, except for those employees whose base compensation includes subsistence and quarters.

c. Payments. Accrued compensation payments will generally be made weekly to the Employee. For purposes of computing the amount of base compensation earned for days consumed in travel from the point of hire to destination for work assignment and for days during which the Employee may be entitled by the provisions of this Agreement to base compensation after termination of employment, a fractional day shall be considered a full day. Compensation earned or to accrue may not be assigned, transferred, or encumbered, in whole or in part, without the prior written consent of the Contractor.

d. Return Transportation Fund. In consideration of the Contractor's agreeing to pay the transportation and traveling expenses of the Employee to "return destination" solely at the Contractor's expense, except in the event the employment herein provided for is "terminated for cause," the Employee agrees to deposit with the Contractor 25% of each compensation payment earned after arrival at the place of work assignment until the "return transportation fund" totals \$120.00, and hereby appoints the Contractor as his special representative and agent for the purpose of depositing 25% of each compensation payment in said fund until it reaches said amount. In the event and only in the event that the employment herein provided for is terminated for cause as provided in Article 3 hereof, the fund thus created shall be used for the purpose of paying the transportation and traveling expenses of the Employee to the return destination and any unexpended balance not used for that purpose shall be promptly returned to the Employee. If this agreement is not terminated for cause, all of such fund shall be included in the final compensation payment. If this agreement is assigned to any other employer in the Alaskan Area as provided in Article 12, the return transportation fund created pursuant to the above will be turned over to the new employer to be deposited in a special account and used as provided above.

Article 3. Term of Employment.

a. The Employee agrees to be employed under this Agreement for a period commencing on the

date hereof and ending upon termination of the employment by the Contractor or the Employee, all in accordance with the terms and conditions of this Agreement. After one year's continuous employment, the Employee may terminate the employment by giving to the Contractor a written notice specifying the termination date, which date shall not be less than fifteen days after the date of the notice. Upon such termination by the Employee, the Contractor shall pay base compensation until the Employee arrives at the return destination as specified or allowed by the Contractor pursuant to Article 4, or fifteen days after the effective date of the termination, whichever shall be the later. The Contractor may without cause terminate the employment at any time after the date hereof by giving the Employee a written notice specifying the termination date, which date may be the same date as the date of notice. Upon such termination by the Contractor, the Contractor shall pay base compensation until the day the Employee arrives at the return destination or for fifteen days after the effective date of termination, whichever shall be the later. Upon such termination by either the Employee or the Contractor, the Employee shall continue to work until the effective date of the termination.

b. The Contractor may for cause terminate the employment instanter by delivering a notice in writing to the Employee specifying the date of termination which may be the date of the notice.

In the event of such termination for cause, no base compensation and no subsistence shall be paid beyond the termination date or the last day worked, whichever shall be the earlier. Termination by the Contractor for cause shall be when the employment is terminated for reason of any fault or dereliction of duty by the Employee, which causes shall include but not be limited to: (1), incompetence; (2), venereal disease incapacitating him for the performance of his work; (3), inordinate use of intoxicating liquors or drugs incapacitating him for the performance of his work; (4), other acts of misconduct. The Agreement shall not be deemed to have been terminated for cause (1) in the event the employment is terminated for reason of the Employee's inability regularly to perform his duties due to illness or physical incapacity not due to the Employee's own fault and certified by a qualified medical doctor designated or approved by the Contractor; or, (2) in the event that the Employee terminates the employment voluntarily after one year's continuous service and after having given the notice required in Section a. of this Article; or, (3) in the event that the Employee is officially required to resign his employment and return to the United States for induction into the armed forces of the United States. In the event that the Employee fails to report for duty and render service without good cause and the Contractor does not elect to terminate the employment therefor, the Contractor shall deduct from his pay a pro

rata part of the base compensation to cover such loss of time and the Employee shall also be denied, pro rata, the subsistence amount applicable to the same period.

Article 4. Transportation and Travel Expense.

a. Transportation and Travel Expense to and from Destination from work assignment. Subject to the right in the Contractor, in the event this Agreement is terminated for cause, to use moneys in the return transportation fund created pursuant to Section d. of Article 2 hereof, to defray transportation and travel expenses of the Employee to return destination, the Contractor shall at his election either furnish or reimburse the Employee for the actual, reasonable, and necessary transportation and travel expenses of the Employee in traveling from New York, New York to the place of work assignment and in traveling to return destination at the termination of employment. The return destination shall be Employee's initial point of hire as indicated in the introductory paragraph of this agreement, or such other point of equivalent or less travel time, distance, and cost as the Employee may elect, subject to the approval of the Contractor. In the event of termination for cause, the Employee hereby waives all rights to the moneys in said return transportation fund used by the Contractor for the purpose of defraying the expenses of transportation and traveling expenses to return destination. Such transportation expenses shall include actual, reasonable, and necessary expense in transporting personal luggage and other property

of the Employee consisting of personal clothing and necessary effects, such as toilet articles. The Contractor will not bear the expense of transporting household goods or the dependents of the Employee, and it is expressly understood and agreed that due to the war emergency and conditions created thereby none of the Employee's family shall accompany the Employee to the destination for work assignment or go thereto either for a visit or for the establishment of residence.

b. Travel During Course of Work. Should the Contractor require the Employee to travel at his expense after arrival at destination for work assignment and prior to proceeding to return destination, the Employee will be reimbursed for the transportation and will be allowed for such travel Six Dollars (&6.00) per day in lieu of all other subsistence expenses including the subsistence amount included in gross compensation.

c. Mode of Travel. All travel to and from destination for work assignment and to return destination and all travel in connection with the employment shall be by such method (air, rail, automobile, or water), schedule, and route, as the Contractor may designate. The Employee releases the Contractor from all liability, if any, for loss or injury to person or property sustained during travel while being transported by the Contractor under this Agreement, or by any carrier or other means of transportation notwithstanding that the Contractor may have directed the Employee so to travel, except as to such loss or injury which is

compensated by insurance maintained by the Contractor in accordance with the provisions of this Agreement.

d. Receipts for Expenses. The Employee will be reimbursed for expenses under this Article only upon the condition that the Employee submits promptly itemized reports properly supported by such written evidence of payment as the Contractor may require. When the initial point of travel departure is within the continental limits of the United States the Contractor will ordinarily pre-pay the [11] costs of transportation, berth and excess baggage to the port of embarkation but, if this is impractical, the employee will be reimbursed for such costs upon presentation of proper receipts therefor. During such travel in the continental United States an allowance of \$3.00 per day will be made in lieu of reimbursement for all expenses for meals and all other incidental costs included above. During any necessary lay-over at the port of embarkation and during any subsequent travel, board and lodging will be furnished the Employee. If any employee is required to furnish his own board and lodging during travel in Alaska the above \$3.00 per diem will be increased to \$6.00.

Article 5. Conditions.

This Agreement is conditioned upon the occurrence of the following within ten days of the date hereof: (1) the Employee's securing all necessary permits and papers required for his departure from the United States and his travel to, and entry into the country of the destination for work

assignment. Expenses incurred by the Employee in obtaining such permits and papers, etc., shall be reimbursed by the Contractor upon receipt of properly itemized expense reports properly supported by such evidence of payment as the Contractor may require; (2), the Employee's securing, if he is subject to the Selective Service Act, such permit as shall be necessary to authorize him to depart from the United States; (3), the Employee's submitting to such physical examination and receiving such vaccination or immunization treatments as the Contractor may require; and (4), the Employee's having undergone prior to his departure such dental or medical treatments by an approved doctor or dentist as may have been prescribed upon the Employee's physical examination. The expense of such examinations and inoculation treatments as the Contractor shall require shall be borne by the Contractor. The expense of any prescribed medical or dental treatment will be borne by the Employee. The Employee shall present a certificate from the dentist or doctor, as the case may be, stating the accomplishment of the required treatment or treatments. The Contractor may extend the time for the accomplishment of the foregoing conditions if it so desires.

Article 6. Departure Time.

The Contractor will extend its best effort to obtain passage for the Employee out of the United States to the destination for work assignment at the earliest time practicable after the date hereof, having due regard to the time allowed under Ar-

ticle 5 for the performance of the conditions herein stipulated. If the Employee is not ready, able, and willing to depart or does not present himself for departure at the designated time and place, the employment shall be terminated and the Contractor shall not reimburse Employee for any expenses incurred by the Employee otherwise reimbursable hereunder. The Employee, in such case, shall be liable for the amount of any advance made by the Contractor and the amount of any other expenses incurred by the Contractor in connection with the employment. In the event that the Contractor fails to obtain passage for the departure of Employee within four weeks after the Employee has advised the Contractor that the foregoing conditions to his departure are performed, he may notify the Contractor in writing that unless such provision is made for his departure within a number of days to be stated by the Employee (but not less than three days), the employment will terminate. Upon such written notice and failure to comply therewith on the part of the Contractor this Agreement shall terminate automatically. In such event, however, the Contractor shall reimburse the Employee the reasonable expenditures made by the Employee in performing the conditions specified as (1), (2), and (3) in Article 5 hereof, and such reimbursements shall be the full extent of the Contractor's liability to the Employee.

Article 7. Vacation Leave.

The Employee shall accrue leave with pay at the rate of two and one-half days per month for each

completed month of service in lieu of all other vacation allowances which leave may, at the discretion of the Contractor, be granted during the course of the employment or at the completion thereof. The termination of this Agreement for cause will be deemed to effect a forfeiture of all accrued leave.

Article 8. Prosecution of Work.

a. The Employee hereby agrees to work at such time or place, on such days and for such periods of time as the Contractor may require or direct. Base compensation, as set forth in paragraph a of Article 2, is established on the basis of a minimum work week of 48 hours and, for purposes of calculating overtime, the straight time hourly rate shall be the weekly base compensation divided by 48.

b. Non-manual employees will be divided into the following groups determined by their weekly base compensation: (1) Group "A" whose salaries are less than \$50 per week, except those included in Group "D"; (2) Group "B" whose salaries are from \$50 to \$90 per week inclusive, except those included in Group "D"; (3) Group "C" whose salaries are in excess of \$90 per week, except those included in Group "D"; (4) Group "D" whose salaries are not customarily related to the number of hours worked per day or the number of days worked in a week.

c. Group "A" employees will be paid at the straight time hourly rate for all authorized work performed in excess of 48 hours during the first six days worked in any regularly work week, and

at two times the straight time hourly rate for all authorized work performed on the seventh consecutive day the Employee works in any regularly established work week.

d. Group "B" employees will be expected to work any reasonable number of hours during the first six days worked in the regularly established work week without payment other than the base compensation. They will be paid at two times the straight time hourly rate for all authorized work performed on the seventh consecutive day the Employee works in any regularly established work week.

e. Group "C" employees will be considered supervisory or executive employees and will be expected to work any necessary number of hours (including the seventh day) without payment other than the base compensation.

f. The number of hours which shall constitute a work week for Group "D" employees shall be determined by the contractor with the approval of the Contracting Officer and base compensation for such employees shall be fixed accordingly. If Group "D" employees are required to work in excess of the number of hours so determined the Employee will not be paid additional compensation but will be granted compensatory time off with pay; provided however that, if unforeseen contingencies require that seven consecutive days be worked by the Employee in any regularly established work week, two times the straight time hourly rate shall be paid for authorized work performed on such sev-

enth consecutive day. For this purpose the straight time hourly rate shall be the base compensation divided by the number of hours in the work week as determined above.

g. No deduction from base compensation of employees in Groups "A," "B," "C," and "D" shall be made for approved absence on the holidays listed below but employees in Groups "A," "B," and "D" who are required to work on such holidays shall be paid at the rate of one and one-half times the straight hourly rate for work so performed. Such holidays are New Years Day, July Fourth, Labor Day, Thanksgiving Day, Christmas Day and Memorial Day or one other such holiday of greater local importance.

Article 9. Compensation for Death, Disability, Capture or Detention.

For the purpose of paying workmen's compensation benefits hereunder the Contractor shall provide benefits as prescribed in the United States Longshoremen's and Harbor Workers' Compensation Act, approved 4 March, 1927 (44 Stat. 1424) as amended and as extended by the Act of 16 August, 1941 (Public Law No. 208, 77th Cong.) as amended, and as extended by the Act of 2 December, 1942 (Public Law No. 784, 77th Cong.). The employees requests that payments under this section shall be paid to Johanna McNally (wife) at 70-33 64th Place, Glendale, L. I. New York.

Article 10. Return of Employee's Remains.

In the event of death of the Employee while at destination for work assignment or in transit there-to or therefrom, the Contractor shall, if transportation facilities are available and in the absence of any law or regulation by any competent Governmental authority, prohibiting the same, at its expense prepare and transport the remains of the Employee to the place designated in Article 4 or to such other point of equivalent or less distance as his spouse or next of kin may elect subject to the approval of the Contractor.

Article 11. Disputes.

Except as otherwise specifically provided in this Agreement all disputes arising hereunder or in relation to this contract between the Contractor and the Employee shall be decided by the Contracting Officer who executed the Government contract under which the Contractor is acting, or his duly authorized successor, representative or representatives, whose decision shall be final and conclusive upon the parties hereto.

Article 12. Notice of Claim.

The Employee agrees that he will, within thirty days after any claim arises, give a written notice to the Contractor setting forth in detail the nature of any debt, claim, charge, or cause of action growing out of or in any way relating to this contract or to the employment herein provided for; that he will file a written proof of claim with the Contractor within thirty days after the lapse of the

aforesaid thirty day period and that he will not institute any suit or action against the Contractor in any court or tribunal in any jurisdiction for any debt, claim, charge, or cause of action prior to a date six months subsequent to the filing by the Employee with the Contractor of such a written and sworn proof of claim, nor later than two years after the claim arises. Such action or suit, if and when instituted, shall not include any claim for damages for reason of any debt, claim, charge, or cause of action not specifically mentioned in the aforesaid proof of claim. It is agreed by the Employee that proof of his violation of any provision of this Article shall be valid and complete defense by the Contractor to any proceeding instituted to contravention of the provisions hereof.

Article 13. Interpretation of Agreement.

This agreement shall be construed and interpreted solely in accordance with the laws of the United States of America. The employee specifically agrees that, at the direction of or with the approval of the Contracting Officer, this agreement may be assigned to the United States, to any of its agencies, or its contractors in the Alaskan Area. This agreement constitutes the entire agreement between the parties hereto relative to the subject matter hereof and no promises or representations on the part of the contractor other than those expressly stated above have been made.

In Witness Whereof, the parties hereto have signed this Agreement the day and year first above

written. Receipt of duplicate by the Employee is hereby acknowledged.

S. Birch & Sons Construction Co. and Morrison-Knudsen Company, Inc.

/s/ W. E. DOUGHERTY,
Office Manager.

/s/ OWEN J. McNALLY,
Employee.

[Marginal Note]: It is further agreed that this Contract expires May 25, 1945, and supersedes in entirety the Contract dated May 25, 1944 by and between these same parties.

/s/ W.E.D.,
B-M-K.

/s/ OWEN J. McNALLY,
Employee. [12]

EXHIBIT "B"

Cost-Plus-A-Fixed-Fee

UNIFORM AGREEMENT OF EMPLOYMENT

For Work on U. S. Government Projects in
The Alaskan War Manpower Area

Applying to Non-Manual Employees of Fixed Fee
Contractors Employed for Work in the Territory of Alaska.

Non-Manual

This Agreement, made this 17th day of April, 1945, by and between S. Birch & Sons Construction Company and Morrison-Knudsen Company,

Inc., of Seattle, State of Washington, hereinafter called the "Employer," and Owen Joseph McNally of New York, State of New York, hereinafter called the "Employee."

Witness That the parties hereto have and do hereby agree as follows:

Article 1. Assignment of Work.

As a condition of obtaining and continuing employment the Employee warrants that all the statements made in his application are true to the best of his knowledge and belief. The Employee hereby certifies that he does not advocate, and is not a member of any organization that advocates the overthrow of the Government of the United States by force or violence.

The Employee's initial classification or designation shall be Clerk. The Employee's initial assignment is to work in that capacity at Alaskan Area. However, the Employee agrees to work, in that or any other designated capacity, to the full extent of his ability, at such time or place, or such days and for such periods as the Employer may require or direct.

Article 2. Compensation.

a. The Employee is to receive compensation at the base pay rate of \$75.00 per six day week, payable by check or currency as the Employer may desire. Unless otherwise directed by the Employer in writing, subject to the approval of the Employer, all compensation payments shall be made at the site of the work.

b. When the Employee is in travel status com-

compensation shall accrue in accordance with the following provisions:

- (1) In the case of the new Employee travel compensation shall commence on the day he departs from point of hire after having complied with the requirements of Article 5.
- (2) In the case of Employees transferred directly to this contract from another War or Navy Department contract travel compensation shall commence on the day of departure for the place of work assignment.
- (3) Travel compensation shall continue from the date of commencement until arrival at the place of work assignment except during delays or interruptions in travel resulting from negligence of the Employee.
- (4) Travel compensation shall accrue during any time occupied in travel between places of work assignment.
- (5) Travel compensation shall accrue during travel provided the Employee has satisfactorily discharged his obligations under this Agreement.
- (6) Travel compensation shall accrue at the weekly base pay rate for the days of Sunday through Friday with no overtime allowance. Any portion of a day after 6:00 a.m. and before 6:00 p.m. spent in travel at the beginning or end of a journey shall be considered a full day

for the purpose of computing accrued travel compensation but travel before 6:00 a.m. or after 6:00 p.m. shall not be counted. No overtime will be allowed when in travel status except that, when the Employee is required to work under the provisions of paragraph d of this Article, pay will be based on the work actually performed. Travel status is to be considered entirely apart and distinct from work status and travel time shall not constitute days worked except that days spent in travel between places of work assignment shall be considered as time worked for the purpose of computing premium pay for work actually performed on the seventh day of the work week.

c. When the Employee is in work status at any place of work assignment compensation shall accrue in accordance with the following provisions:

- (1) The base pay rate is to be full compensation for work performed during the first six days worked in the regularly established work week. For purposes of calculating overtime the straight time hourly rate shall be the weekly base pay rate divided by 48 and the straight time daily rate shall be the weekly base pay rate divided by 6.
- (2) Non-Manual employees shall be divided into groups, according to the amount of

the base pay rate as follows: Group A paid not in excess of \$50.00, Group B paid more than \$50.00 but not in excess of \$90.00, Group C paid in excess of \$90.00.

- (3) For all authorized work performed in excess of forty-eight hours during the first six days of the regularly established work week, Group A shall be paid the straight time hourly rate.
- (4) Group B Employees will be expected to work any reasonable numbers of hours six days per week without payment of additional compensation.
- (5) For all authorized work performed on the seventh consecutive day the Employee works in the regularly established work week Group A and Group B shall be paid two times the straight time hourly rate.
- (6) Group A and Group B shall be paid one and one-half times the straight time daily rate for authorized work performed on any of the following holidays although no penalty will be applied to the weekly base pay rate for absence on any such holiday unless the Employee has been directed to work: New Year's Day, July Fourth, Labor Day, Thanksgiving, Christmas Day and Memorial Day or one other such holiday of greater local importance. However no such holiday premiums shall effect multiplication of other overtime premiums.

- (7) Group C employees are expected to work any number of hours through the work week, including the seventh day, necessary to accomplish their task but will be paid no overtime.

d. Compensation shall be subject to deduction for Subsistence, Return Transportation Fund, for Social Security Tax, Alaska School Tax, and other deductions required by law, if applicable, and to such deductions as may be provided for by regulations of the Secretary of Labor in the interest of the Employee and of the work. If the Employee is in travel status and, at some intermediate point, involuntary layover is necessitated by lack of transportation, he will be expected to perform any work assigned to him by the Employer which reasonably conforms to the designation for which he is employed. Sometimes it is necessary that passengers supplement the culinary staffs on boats used for transportation of Employees and, in such cases, the Employee will be required to do his share.

e. If the Employee is not qualified to perform the work stipulated in Article 1, the parties hereto may agree upon his reassignment to a designation for which he is qualified, in which event the Employee is to be paid the base pay rate applicable to the reassignment and this Agreement will be modified in writing accordingly. If, under such conditions, the Employee refuses reassignment to a designation for which he is qualified such refusal shall forfeit his right to return travel compensation, transportation and travel expenses.

f. In the event that the Employee fails to re-

port for duty and render service the base pay rate shall be reduced accordingly unless the absence is authorized as chargeable to earned leave. In all cases leave must be requested in advance and approved in writing before it will be recognized as authorized absence.

g. The Employee shall accrue leave with pay at the rate of two and one-half days per month for each completed month of service which shall be the total allowance for sick leave and vacation leave. Such leave may, at the discretion of the Employer, subject to the approval of Contracting Officer, be granted during the course of employment or at the completion thereof. Employees who fail to complete the term of employment specified in Article 3 or who are separated because of their own misconduct (including such cases as insubordination, drunkenness on the job, theft, etc.) shall forfeit any leave which they may have accrued at the time of separation.

h. The Employer is obligated by this Agreement to provide the Employee with return transportation only upon satisfactory completion of the terms of employment as set forth in paragraph a, Article 3 hereof, or upon termination due to physical incapacity or induction orders as provided in paragraph b, Article 3 hereof. If the Employee quits before satisfactory completion, is discharged for cause or refuses re-assignment, as provided in paragraph e above, the Employer's responsibility ceases. In order to prevent hardship to the Employee in such an event, and insure his return, the Employee agrees to deposit with the Employer 25

per cent of each compensation payment earned after arrival at the place of work assignment until his "Return Transportation Fund" totals One Hundred and Fifty (\$150.00) Dollars, and hereby appoints the Employer as his special representative and agent for the purpose of making such deposits. Upon satisfactory completion of the term of employment under this Agreement all of such fund shall be returned to the Employee in the final compensation payment. If this Agreement is assigned to any other employer in the Alaskan Area the "Return Transportation Fund" will be turned over to the new Employer for deposit as above. In the event, and only in the event, that the term of employment under this Agreement is not satisfactorily completed the fund thus created shall be used for the purpose of paying the transportation and travel expenses of the Employee to the port of re-entry into the Continental Limits of the United States, or to point of hire if within Alaska, and any unexpended balance not used for that purpose shall be promptly returned to the Employee, provided, however, that the Employer's obligation to return the Employee to the port of re-entry, or the point of hire if within Alaska, shall not extend to any expenditures beyond the amount that the Employee has deposited in the "Return Transportation Fund."

Article 3. Term of Employment.

a. The Employee agrees to be employed under this Agreement for a period commencing on the date hereof and ending upon termination of the employment by the Employer or the Employee, all

in accordance with the terms and conditions of this Agreement. If termination is desired by the Employee after six month's employment, excluding furlough time, the Employee may terminate the employment by giving the Employer a written notice specifying the termination date, which effective date shall not be less than fifteen days after the date of the notice nor less than six full calendar months after the date of this Agreement. The employer may without cause terminate the employment at any time after the date hereof by giving the Employee a written notice specifying the termination date. Upon such notification by either the Employee or the Employer, the Employee shall continue to work until the effective date of the termination and/or until the first available return transportation thereafter. [13]

b. The Employer may, for cause, terminate the employment instanter by delivering a notice in writing to the employee specifying the date of termination. In the event of such termination for cause, no compensation and no transportation or travel expenses shall be paid beyond the termination date or the last day worked, whichever shall be the earlier. Termination by the Employer for cause shall be when the employment is terminated for reason of any fault or dereliction of duty by the Employee which causes shall include but not be limited to: (1) insubordination; (2) venereal disease incapacitating him for the performance of his work; (3) inordinate use of intoxicating liquors or drugs incapacitating him for the performance

of his work; (4) other acts of misconduct. The Agreement shall not be deemed to have been terminated for cause (1) in the event the employment is terminated for reason of the Employee's inability regularly to perform his duties due to illness or physical incapacity not due to the Employee's own fault and certified by a qualified medical doctor designated or approved by the Employer; or (2) in the event that the Employee terminates the employment voluntarily after six months' employment, excluding furlough time, and after having given the notice required in paragraph a of this Article, or (3) in the event that the Employee is officially required to resign his employment for induction into the Armed Forces of the United States.

Article 4. Transportation and Travel Expenses.

a. Transportation and travel expenses to and from destination for work assignment. The Employer shall, at his election, either furnish or reimburse the Employee for the actual, reasonable and necessary transportation and travel expenses of the Employee in traveling from New York, New York to the place of the work assignment and, upon satisfactory completion of this contract, in traveling to return destination at the termination of employment. The return destination shall be Employee's initial point of hire as indicated in the introductory paragraph of this Agreement or such other point of equal or less travel time, distance, and cost as the Employee may select, subject to the approval of the Employer. Such transporta-

tion expenses shall include actual, reasonable and necessary expense in transporting personal luggage and other property of the Employee consisting of personal clothing, tools, and necessary effects, such as toilet articles. The Employer will not bear the expense of transporting household goods or the dependents of the Employee, and it is expressly understood and agreed that, due to the war emergency and conditions created thereby, none of the Employee's family shall accompany the Employee to the destination for work assignment or go there-to either to visit or for the purpose of establishing a residence. In the event of termination for cause the Employer shall furnish transportation and necessary travel expenses to return the Employee to a port of re-entry into the Continental Limits of the United States, or to point of hire if within Alaska, to the extent permitted by the amount of the Return Transportation Fund created by the Employee as outlined in Article 2, paragraph h. In such a case the Employee hereby waives all rights to the moneys in said Return Transportation Fund used by the Employer for the purpose of defraying the expenses of transportation and travel expenses to the port of re-entry, or to point of hire if within Alaska, but any unexpended balance not used for that purpose shall be returned to the Employee.

b. **Travel During Course of Work.** Should the Employer require the Employee to travel at his own expense after arrival at destination for work assignment and prior to proceeding to return des-

tion, the Employee will be reimbursed for the costs of transportation and will be allowed during such travel Six Dollars (\$6.00) per day for subsistence and lodging when utilizing commercial facilities.

c. Mode of Travel. All travel to destination for work assignment and to return destination and all travel in connection with the employment shall be by such method (air, rail ,automobile, or water), schedule, and route, as the Employer may designate. The Employee releases the Employer from all liability, if any, for loss or injury to person or property sustained during travel while being transported by the Employer under this Agreement, or by any carrier or other means of transportation notwithstanding that the Employer may have directed the Employee so to travel, except as to such loss or injury which is compensated by insurance maintained by the Employer in accordance with the provisions of this Agreement.

d. Receipts for Expenses. The Employee will be reimbursed for expenses under this Article only upon the condition that Employee promptly submits itemized reports properly supported by such written evidence of payment as the Employer may require. When the initial point of travel departure is within the Continental Limits of the United States, the Employer will ordinarily prepay the cost of transportation and excess baggage to the port of embarkation; but if this is impracticable, the Employee will be reimbursed for such cost upon presentation of receipts therefor. During such

travel within the Continental Limits of the United States, an allowance of Three Dollars (\$3.00) per day will be made in lieu of reimbursement for actual expenses for meals and other incidental costs not included in the above. During any necessary layover at the port of embarkation, and during any subsequent travel, board and lodging ordinarily will be furnished by the Employer. Should the Employee be required to travel at his own expense within Alaska, allowances will be in accordance with paragraph b of this Article. No receipts are required for items covered by per diem allowance.

Article 5. Conditions.

a. This Agreement shall not become valid and operative until the Employee has complied with the following requirements, to which he hereby agrees: (1) presentation of a valid Certificate of Availability; (2) presentation of satisfactory evidence of citizenship; (3) submission to physical examination, vaccination or immunization treatments as are required; (4) completion, prior to his departure, of such dental or medical treatments by an approved doctor or dentist as may have been prescribed upon the Employee's Physical Examination. The expense of such examination and inoculation treatments as the Employer shall require shall be borne by the Employer. The expense of any prescribed medical or dental treatment will be borne by the Employee. The Employee shall present a certificate from the dentist or doctor, as the case may be stating the accomplishment of the required treatment or treatments; and (5) the Em-

ployee's securing, if he is subject to the Selective Service Act, such permit as shall be necessary to authorize him to depart from the United States. Note: It shall be definitely understood that final physical examination and clearance will be performed by Government doctors at the port of embarkation before departure from the States so no information should be withheld during preliminary examination at point of hire.

b. In the event that the Employee has not complied with the foregoing requirements within a period of 10* days from the date of initial interview the Employee must reinstate his application for further consideration.

Article 6. Departure Time.

The Employer will extend his best efforts to obtain transportation for the Employee to the Place of work assignment at the earliest time practicable after compliance with the conditions of Article 5. If the Employee is not ready, able and willing to depart from his point of hire or does not present himself for departure at the designated time and place, the employment shall terminate and the Employer shall not reimburse the Employee for any expenses incurred by the Employee otherwise reimbursable hereunder. The Employee in such case, shall be liable for the amount of any advance made by the Employer and the amount of any other expenses incurred by the Employer in connection with the employment except for work actually performed under the provisions of Article 2, paragraph d. It is expressly understood that travel

compensation is not payment of wages for services rendered but is allowed the Employee to avoid hardship which might otherwise result from lack of income during the period required to reach a distant place of work assignment. This allowance is made contingent upon the Employee's arrival at the place of work assignment and any payments made enroute constitute advances for which the Employee is liable if he fails to reach the job due to fault or negligence on his part.

Article 7. Subsistence.

Employees shall be furnished subsistence and quarters at the job site at a charge not to exceed One Dollar and Fifty Cents (\$1.50) per day.

Article 8. Compensation for Death, Disability, Capture or Detention.

For the purpose of paying workmen's compensation benefits hereunder, the Employer shall provide benefits as prescribed in the United States Longshoremen's and Harbor Workers' Compensation Act, approved 4 March 1927 (44 Stat. 1424) as amended and as extended by the Act of 16 August 1941 (Public Law No. 208, 77th Cong.) as amended and as extended by the Act of 2 December 1942 (Public Law No. 784, 77th Cong.).

Article 9. Disputes.

Except as otherwise specifically provided in this Agreement all disputes arising hereunder, or in relation to this Agreement, between the Employer and the Employee shall be decided by the Contracting Officer who executed the Government contract under which the Employer is acting, or his duly

authorized successor or representative, whose decision shall be final and conclusive upon the parties hereto.

Article 10. Notice of Claim.

The Employee agrees that he will, within thirty days after any claim arises, give a written notice to the Employer setting forth in detail the nature of any debt, claim, charge, or cause of action growing out of or in any way relating to this Agreement or to the employment herein provided for, that he will file a written proof of claim with the Employer within thirty days after the lapse of the aforesaid thirty day period; and that he will not institute any suit or action against the Employer in any court or tribunal in any jurisdiction for any debt, claim, charge, or cause of action prior to a date six months subsequent to the filing by the Employee with the Employer of such a written and sworn proof of claim, not later than two years after the claim arises. Such action, or suit, if and when instituted, shall not include any claim for damages for reason of any debt, claim, charge, or cause of action not specifically mentioned in the aforesaid proof of claim. It is agreed by the Employee that proof of his violation of any provision of this Article shall be valid and complete defense by the Employer to any proceeding instituted in contravention of the provisions hereof.

Article 11. Interpretation of Agreement.

This agreement shall be construed and interpreted solely in accordance with the laws of the United States of America. The Employee speci-

fically agrees that, at the direction of or with the approval of the Contracting Officer, this Agreement may be assigned to the United States or to any other Employer engaged in War Department construction work in the Alaskan Area. In case of assignment to the United States the provisions of Article 2 will be modified to the extent required to conform to the laws and regulations governing compensation and leave benefits of Government Employees. This Agreement constitutes the entire agreement between the parties hereto relative to the subject matter hereof and no promises or representations on the part of the Employer other than those expressly stated above have been made.

In Witness Whereof, the Parties hereto have signed this Agreement the day and year first above written. Receipt of duplicate by the Employee is hereby acknowledged.

S. Birch & Sons Construction Co. and Morrison-Knudsen Company, Inc.

Employer.

By /s/ C. G. WEBER,

Assistant Personnel Manager.

/s/ OWEN J. McNALLY,

Employee.

[14]

*Not to exceed thirty days.

[Endorsed]: Filed Oct. 10, 1946.

[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER AND
AFFIRMATIVE DEFENSES

Come now the defendants herein and by way of Supplemental Answer and Affirmative Defenses to the Complaint of the plaintiff herein, pursuant to leave granted by Order of this Court, dated the 16th day of June, 1947, plead and allege:

V.

That all contracts of employment between the plaintiff and these answering defendants, and all wages and salaries paid thereunder were approved and paid in good faith by defendants in conformity with and in reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit, the United States War Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

VI.

That any act or omission of defendants under [15] the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, was in good faith and in the reasonable belief on the part of the defendants that

any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended.

Wherefore, the defendants pray that the Complaint of the plaintiff herein be dismissed with prejudice, and that defendants may have and recover their costs and disbursements to be taxed herein.

ALLEN, HILEN, FROUDE &
DeGARMO.

By /s/ GERALD DeGARMO,
Attorneys for Defendants.

(Acknowledgment of Service.)

[Endorsed]: Filed June 18, 1947.

[16]

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES
IN INTERVENTION

The United States of America, intervenor herein, for its pleading in intervention says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.

2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious

question but if the Court should entertain serious doubts concerning the constitutionality of that Act, it should first consider the defenses raised by the defendants which are not based upon the Portal-to-Portal Act of 1947, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question.

Wherefore, the United States of America prays that the Court enter a judgment herein which shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947. [17]

TOM C. CLARK,
Attorney General.

By /s/ HERBERT A. BERGSON,
Acting Assistant
Attorney General.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant United States
Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

JOHANNA M. D'AMICO,
Attorney, Department of
Justice.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 29, 1947.

[18]

[Title of District Court and Cause.]

STIPULATION CONCERNING RECORD
ON APPEAL

It is hereby stipulated between the above named parties, by their respective attorneys of record, as follows:

That the Stipulation and Pre-Trial Order Re Portal Act Hearing and the reporter's transcript of evidence and exhibits, heretofore transmitted to the Circuit Court of Appeals for the Ninth Circuit in Tyler vs. S. Birch and Sons Construction Company, a corporation, et al, Number 1293, may be the Stipulation and Pre-Trial Order Re Portal Act Hearing and the reporter's transcript of evidence and exhibits in this cause, and in lieu thereof, a copy of the within stipulation and order shall be transmitted to the said Circuit Court of Appeals.

Dated at Seattle, Washington this 30th day of July, 1948.

OSCAR A. ZABEL and
FREDERICK PAUL.

By FREDERICK PAUL,
Attorneys for Plaintiff.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendant.

J. CHARLES DENNIS &
FRANK PELLEGRINI.

By FRANK PELLEGRINI,
Attorneys for the United States of America.

It is so ordered this 5th day of August, 1948.

JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed Aug. 5, 1948. [19]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause having heretofore come on regularly for trial before the undersigned, one of the Judges of the above entitled Court, upon the Complaint of the plaintiff and the Answer and Affirmative Defenses of the defendants; and the plaintiff having appeared by his Attorneys, Oscar A. Zabel and Frederick Paul, and the defendants having appeared by their representative and having been represented by their Attorneys, Allen, Hilen, Froude & DeGarmo; and evidence having been introduced on behalf of plaintiff and defendants, and the Court having heard and considered the evidence, the argument of counsel and the briefs submitted on behalf of plaintiff, defendants, and the United States of America, appearing as intervenor, and having heretofore orally announced its decision herein, now makes the following:

FINDINGS OF FACT

I.

That plaintiff brought this action pursuant to the provisions of Section 16 (b) of the Fair Labor Standards Act of 1938, as Amended, to recover overtime compensation and an equal amount as liquidated damages, [20] and a reasonable attorneys' fee, and that jurisdiction is conferred on this Court by Section 14 (8), Title 28, United States Code.

II.

That the defendant, S. Birch & Sons Construction Company, is a Montana corporation, doing business under said name and style; and the defendant, Morrison-Knudsen Company, Inc., is a Delaware corporation; and that both of said defendants were qualified to do, and were doing, business in the State of Washington during the times herein-after mentioned, jointly maintaining an office in Seattle, Washington.

III.

That the said defendants were joint venturers and had Cost-Plus-A-Fixed-Fee Contracts, Numbers W45-108-eng-501, W45-108-eng-1360, and W45-108-eng-1499 with the United States of America, for the construction of military installations in the Territory of Alaska.

IV.

That the plaintiff was first employed by defendants as a non-manual worker, under a written Contract of Employment, Plaintiff's Exhibit 6, on September 24, 1944, at Adak, Alaska, in connection

with the performance of Contract No. W45-108-eng-501 as a "Storekeeper", at a "base compensation" rate of \$70.00 per week, and worked at said position and rate until December 24, 1944, when he was reclassified to a "base compensation" rate of [21] \$75.00 per week, at which rate he continued his work until February 10, 1945.

That plaintiff was subsequently re-employed by defendants for work at Cold Bay, Alaska, under Contract No. W45-108-eng-1360, on April 17, 1945, under a written Contract of Employment, Plaintiff's Exhibit 7, as a "Clerk", at a "base pay rate of \$75.00 for 6-day week", at which position and rate of pay he worked until July 14, 1945, at which time he was transferred to Attu, Alaska, to work for defendants, under Contract No. W45-108-eng-1499, as a "Storekeeper", under contract, Plaintiff's Exhibit 7, but at a reclassified "base pay rate of \$80.00 for 6-day week", under which classification and pay rate the plaintiff worked until November 10, 1945.

V.

That while employed by defendants under the said written contract, and at the "base compensation rate of \$70.00 per week", the plaintiff worked ninety-six (96) hours in excess of forty (40) hours per work-week, for which he was paid only straight time, one hundred fifty-six (156) hours in excess of forty (40) hours per work-week, for which he was paid no overtime, and one hundred thirty (130) hours in excess of forty (40) hours per work-week upon the seventh day of the work-week, for which he was paid double-time.

That while employed by defendants under the said written contract, and at the “base compensation rate of \$75.00 for 6-day week”, the plaintiff worked one hundred four (104) hours in excess of forty (40) hours per work-week, for which he was paid only straight time, one hundred eighty-eight (188) hours in excess of forty (40) hours per work-week, for which he was paid no overtime, and one [22] hundred seventy-four (174) hours in excess of forty (40) hours per work-week upon the seventh day of the work-week, for which he was paid double-time.

That while employed by defendants under the said contract, and at the “base pay rate of \$80.00 for 6-day week”, the plaintiff worked eighty (80) hours in excess of forty (40) hours per work-week, for which he was paid only straight time, one hundred thirty-four (134) hours in excess of forty (40) hours per work-week, for which he was paid no overtime, and one hundred twenty (120) hours in excess of forty (40) hours per work-week upon the seventh day of the work-week, for which he was paid double-time.

That the “regular rate” of pay of the plaintiff under the Contracts of Employment with the defendants, heretofore mentioned, was as follows for the several rates of pay:

\$70.00 per week divided by 48 equals \$1.4583
per hour

\$75.00 per week divided by 48 equals \$1.5625
per hour

\$80.00 per 6 day week divided by 48 equals
\$1.6666 per hour

VI.

That the duties of plaintiff at Adak consisted of writing equipment inspection reports, which was an inventory of trucks, cranes, bulldozers, scrapers and other construction equipment; of writing material requisitions for replacement parts, materials and **supplies**; the said requisitions were shipped to Seattle and the merchandise ordered from the manufacturers and shipped to the jobsite on the basis of said requisitions; of typing correspondence for the Chief Storekeeper to the Seattle office of defendants, and to Project Managers at other jobsites in Alaska of defendants relating to shipment of supplies, reasons [23] for ordering such supplies, speed of transporting the same, and inquiries of arrival dates of said supplies; of typing letters for the Personnel Manager relating to personal baggage of employees, lost in transit from continental United States to the jobsite; of typing letters for the Personnel Manager relating to personal tools lost in transit from continental United States to the jobsite; of sending radiograms which ordered parts, materials and supplies from the Seattle office of defendants for emergency shipments, material requisitions being later forwarded by the plaintiff confirming the radiograms; of inventorying personal tools belonging to other employees of defendants; of writing affidavits of loss for other employees who lost tools assigned to them on the job; of typing lists of equipment parts, materials and supplies destined for defendants from the ship's manifests, which contained a list of the entire cargo

of a ship arriving at the jobsite from continental United States; of making up baggage manifests for the shipment of personal baggage belonging to defendants' employees enroute to continental United States; of working on the final report which was an accounting record of all equipment parts, materials and supplies; of typing equipment transfers which recorded the transfer equipment to other CPEF contractors from the defendants; that the plaintiff's duties as an employee of defendants were in interstate commerce.

That when plaintiff worked at Cold Bay, his duties were substantially similar to those performed at Adak, but in addition thereto he wrote receiving reports from packing lists attached to boxes and crates shipped from continental United States inventorying the identification number, quantity received, description of parts and discrepancies [24] of such lists with the purchase order originally ordering the goods purchased from manufacturers in continental United States.

That the plaintiff's duties as an employee of defendants were in interstate commerce.

That when the plaintiff worked at Attu for the defendants, his duties were substantially similar to those performed at Cold Bay, including the writing of receiving reports.

That the plaintiff's duties as an employee of defendants were in interstate commerce.

VII.

That all practices of the defendants, with respect to the payment of overtime compensation for all

hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, in conformity with and in reliance on Administrative regulations, orders, rulings, approvals and interpretations of the following agencies of the United States, to-wit, the United States War Department, the Corps of Engineers of the United States War Department, and the War Department Wage Administration Agency.

VIII.

That all practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, and that the defendants had reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as amended.

Done in open court this 2nd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

From the foregoing Findings of Fact the Court hereby deduces the following:

CONCLUSIONS OF LAW

I.

That the plaintiff was, during all of the times hereinbefore and hereinafter mentioned, and for the number of overtime hours set forth in the foregoing Findings of Fact, engaged in interstate commerce.

II.

That the plaintiff was neither a bona fide executive nor administrative employee during his employment by defendants.

III.

That the Portal-to-Portal Act of 1947 is, and Sections 9 and 11 thereof are, constitutional.

IV.

That defendants are subject to no liability to the plaintiff for or on account of defendants' failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as Amended.

V.

That the action of the plaintiff herein should be dismissed with prejudice, and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants, to be taxed in accordance with law and the rules of this Court.

Done in open court this 2nd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

Presented by

ALLEN, HILEN, FROUDE, &
DeGARMO,

By /s/ GERALD DeGARMO,

[Endorsed]: Filed March 2, 1948. [25]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

Civil Action—No. 1628

OWEN J. McNALLY,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-KNUD-
SEN COMPANY, a corporation,

Defendants.

JUDGMENT

This cause having heretofore come on regularly for trial before the undersigned, one of the Judges of the above entitled Court, upon the Complaint of the plaintiff and the Answer and Affirmative Defenses of the defendants; and the plaintiff having appeared by his Attorneys, Oscar A. Zabel and Frederick Paul, and the defendants having appeared by their representative and having been represented by their Attorneys, Allen, Hilén, Froude & DeGarmo; and evidence having been introduced on behalf of plaintiff and defendants, and the Court having heard and considered the evidence, the argument of counsel and the briefs submitted on behalf of plaintiff, defendants, and the United States of America, appearing as intervenor, and having heretofore orally announced its decision herein, and having heretofore made and entered Findings of

Fact and Conclusions of Law; and the Court being fully advised:

Now, therefore, it is hereby ordered, adjudged and decreed that the action of the plaintiff herein be and the same is hereby dismissed, with prejudice and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants and against the plaintiff, to be taxed in the manner provided by law and by the rules of this Court.

Done in open court this 2nd day of March, 1948.

JOHN C. BOWEN,
District Judge.

Presented by

ALLEN, HILEN, FROUDE &
DeGARMO,
By GERALD DeGARMO.

(Entered on Civil Docket Mar. 2, 1948.)

[Endorsed]: Filed March 2, 1948. [26]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: S. Birch & Sons Construction Co., a corporation, and Morrison-Knudsen Company, a corporation, defendants, and Allen, Hilen, Froude & America, intervener, and J. Charles Dennis and Frank Pellegrini, its attorneys:

Notice is hereby given that the above named plaintiff appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, and the whole thereof, involved in the above cause of action entered in the above named action on the 2nd day of March, 1948, and which is now final.

Dated at Seattle, Washington, this 27th day of April, 1948.

ZABEL, POTH & PAUL and
FREDERICK PAUL,

By FREDERICK PAUL,
Attorneys for Plaintiff.

[Endorsed]: Filed April 30, 1948. [27]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men By These Presents:

That I, Owen J. McNally, the plaintiff above named, as principal of the National Surety Corporation, a corporation, organized under the laws of the State of New York, and authorized to transact business of surety in the State of Washington, as surety are held and firmly bound onto S. Birch & Sons Construction Co., a corporation, and Morrison-Knudsen Co., a corporation, the defendants named in the above entitled action, and United States of America, Intervenor, in the just and full sum of \$250.00, for which sum well and true to be paid, we bind ourselves, our and each of our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents:

Sealed with our seals and dated this 14th day of July, 1948.

The condition of this obligation is such:

That, whereas, the above named defendants on the 2nd day of March, 1948, in the above entitled action and Court, recovered judgment against the plaintiff above named; and, [28]

Whereas, the above named principal has heretofore given due and proper notice that he appeals from said judgment of the above entitled Court to the Circuit Court of Appeals;

Now, therefore, if the said principal, Owen J. McNally, shall pay to S. Birch & Sons Construction Co., a corporation, and Morrison-Knudsen Co., a

corporation, and to United States of America, all costs and damages that may be awarded against said defendants and intervenor on the appeal, or on the dismissal thereof, not to exceed the sum of \$250.00, and shall satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the United States Circuit Court of Appeals, for the Ninth Circuit may render, or make, or order to be rendered, or made by the above entitled Court, then this obligation to be void; otherwise, to remain in full force and effect.

OWEN J. McNALLY,

By /s/ FREDERICK PAUL,
One of His Attorneys.

NATIONAL SURETY
CORPORATION,

(Seal) By /s/ MILDRED PALITZKE,
Attorney-in-Fact.

[Endorsed]: Filed July 15, 1948. [29]

United States Circuit Court of Appeals for the
Ninth Circuit

No. 1628

OWEN J. McNALLY,

Plaintiff, Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation,
and MORRISON-KNUDSEN CO., a corporation,

Defendants, Appellees.

UNITED STATES OF AMERICA,

Intervenor.

STIPULATION AND ORDER EXTENDING
TIME TO FILE AND DOCKET CAUSE

Whereas, in the above entitled case, the plaintiff has filed his notice of appeal to the above entitled court, and

Whereas, the record on appeal in said cause is and

Whereas, the order to the court reporter to transcribe the record was timely given; and

Whereas, the record has just been received and cannot be processed through the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, prior to the expiration of the time allowed by law to file and docket the same in the above entitled court. [30]

Now, therefore, it is hereby stipulated by and

between the above named parties through their respective attorneys that the time to file and docket the said cause may be extended to on or before August 15, 1948.

Dated at Seattle, Washington this 16th day of July, 1948.

ALLEN, HILEN, FROUDE
& DeGARMO,

By GERALD DeGARMO,
Attorneys for Appellees.

OSCAR A. ZABEL &
FREDERICK PAUL,

By FREDERICK PAUL,
Attorneys for Appellant.

It is so ordered this 19th day of July, 1948.

FRANCIS A. GARRECHT,
United States Circuit Judge.

A true copy. Attest: July 19, 1948. Paul P.
O'Brien, Clerk. (Seal).

[Endorsed]: Filed July 19, 1948. Paul P.
O'Brien, Clerk.

[Endorsed:] Filed July 21, 1948. Millard P.
Thomas, Clerk. [31]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The plaintiff states that the points upon which he intends to rely upon appeal are the following:

1. The court erred in finding, concluding, and adjudging that all practices of the defendants, or any such practices, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work week were in good faith, in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretations of the following agencies of the United States, to wit: The United States War Department, the Corps of Engineers of the United States War Department, and the War Department Wage Administrative Agency, or an agency of the United States.

2. The court erred in finding, concluding, and adjudging that all the practices of the defendants with respect to the payment of overtime compensation for all hours worked by the plaintiffs in excess of forty (40) hours in any one work week, or any such practices, were in good faith, or that the defendants had [32] reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1948, as amended.

3. The court erred in finding, concluding, and adjudging that the defendants relied in good faith, or at all, upon anything except the contract which

they had with the War Department of the United States.

4. The court erred in holding that Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947 are constitutional.

Dated at Seattle this 12th day of July, 1948.

OSCAR A. ZABEL and
FREDERICK PAUL,

By /s/ FREDERICK PAUL,
Attorneys for Plaintiff.

(Acknowledgment of Service.)

[Endorsed]: Filed July 27, 1948. [33]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Plaintiff hereby designates the following portions of the record to be contained in the record on appeal in the above-entitled action:

1. Complaint
2. Answer
3. Supplemental Answer and Affirmative Defense
4. Pleading of the United States in Intervention
5. Stipulation Concerning Record on Appeal

6. Findings of Fact and Conclusions of Law
7. Judgment
8. Notice of Appeal
9. Cost Bond on Appeal
10. Order Granting Extension of Time to File Record and Docket Cause
11. Statement of Points on Appeal
12. This Designation

Dated at Seattle this 12th day of July, 1948.

OSCAR A. ZABEL &
FREDERICK PAUL,

By FREDERICK PAUL,
Attorneys for Plaintiff.

(Acknowledgment of Service.)

[Endorsed]: Filed July 27, 1948. [34]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF RECORD ON APPEAL

S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, a corporation, defendants in the above entitled action and appellees, hereby designate the following additional portions of the record in the above entitled

case, to be contained in the Record on Appeal to the Circuit Court of Appeals for the Ninth Circuit:

(1) Stipulation and Pre-Trial Order Re Portal Act Hearing.

Dated at Seattle, Washington, this 20th day of July, 1948.

ALLEN, HILEN, FROUDE
& DeGARMO,

By /s/ GERALD DeGARMO,
Attorneys for Defendants
and Appellees.

(Acknowledgment of Service.)

[Endorsed]: Filed July 21, 1948. [35]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered 1 to 79, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by designations of counsel filed and shown

herein, as the same remain of record and on file in the Office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the supplemental judgment of said United States District Court for the Western District of Washington filed and entered on March 2, 1948, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparing record on [80] appeal in the above entitled cause, to-wit:

Clerk's fees: 3 pages at 40c, \$1.20; 77 pages at 10c, \$7.70; Notice of Appeal, \$5.00; total, \$13.90.

I hereby certify that the above amount has been paid to me by the attorney for the appellant.

In witness whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 9th day of August, 1948.

(Seal)

MILLARD P. THOMAS,
Clerk. [81]

[Endorsed: No. 12018. United States Court of Appeals for the Ninth Circuit. Owen J. McNally, Appellant, vs. S. Birch & Sons Construction Co., a corporation, Morrison-Knudsen Co., a corporation, and United States of America, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed August 11, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 12018

OWEN J. McNALLY,

Plaintiff, Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation, and MORRISON-KNUDSEN CO., a corporation,

Defendants, Appellees.

UNITED STATES OF AMERICA,

Intervenor.

ORDER

The above-entitled matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the appellants herein for an order that the stipulation concerning evidence and pre-trial order and the designated portions of the transcript of testimony may be printed in the case of Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen, Inc., No. 11983 only, and incorporated by reference in the other four cases, and the Court having considered the said motion, the file and record herein, and the stipulation of all parties in support thereof,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the stipulation concerning evidence and pre-trial order and the designated portions of the transcript of the testimony shall be printed in the case of Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen, Inc., No. 11983 only and in the remaining cases a copy of the stipulation in support of the said motion shall be printed in lieu of such portions and such portions of the record shall be incorporated therein by reference.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER

This matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the above-named appellants for an order permitting all Exhibits in the above-entitled cases, consisting of three bound volumes of white background photostatic copies of various documents, to be considered in their original form by this Court and not be printed in the record, and the Court having considered the said motion,

the file and record herein, and the stipulation of all parties in support of said motion.

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed that all exhibits in the above-entitled cases may be considered in their original form and not be printed in the record.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ADOPTION OF STATEMENT OF POINTS
ON APPEAL

The above named appellant hereby adopts statement of points on appeal heretofore filed in the District Court in this cause.

/s/ FREDERICK PAUL,
Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed August 24, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF PORTION OF RECORD
TO BE PRINTED

The above named appellant hereby designates the entire record heretofore transmitted to the Court in this action be printed together with this designation, adoption of statement of points on appeal, and a stipulation and order of record on appeal heretofore filed in the above entitled Court; except the appellant does not designate pre-trial order relating to the Portal hearing to be printed.

/s/ FREDERICK PAUL,
Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed August 24, 1948. Paul P. O'Brien, Clerk.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON O. TYLER,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTING COMPANY, a
Corporation, and MORRISON-KNUDSEN COMPANY
INC., a Corporation,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

FILED

DEC 14 1948

PAUL P. O'BRIEN,
CLERK

WETTRICK, FLOOD & O'BRIEN,
Attorneys for Appellant.

805-10 Arctic Building,
Seattle 4, Washington.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON O. TYLER,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTING COMPANY, a
Corporation, and MORRISON-KNUDSEN COMPANY
INC., a Corporation,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

WETTRICK, FLOOD & O'BRIEN,
Attorneys for Appellant.

805-10 Arctic Building,
Seattle 4, Washington.

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**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

VERNON O. TYLER, *Appellant,*

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a Corporation, and MORRISON-
KNUDSEN COMPANY, a Corporation,
Appellees.

No.11983

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

JURISDICTION

This action was originally instituted under provisions of the Fair Labor Standards Act of 1938, as amended, Title 29 U.S.C.A., Sec. 201-219, in the United States District Court for the Western District of Washington, Northern Division, to recover sums due overtime labor performed by appellant individually and his assignors for the appellees during the years 1944 and 1945. The cause was tried by the court in May, 1946 (R. 4). A judgment was entered in favor of the present appellant. Thereafter the present appellees appealed to this court (see record and briefs in Cause No. 11463). After argument but before deci-

sion in this court in May, 1947, the present appellees moved this court for an order remanding the causes to the District Court in order to permit the defendants to proffer pleadings under the then recently passed Portal to Portal Act of 1947 (R. 7). This order was granted and the causes remanded to permit such proffer (R. 7). Thereafter, November 4, 1947, the defendants proffered pleadings and defenses under the Portal to Portal Act. On March 2, 1948, after a trial upon the issues, the court entered its Findings of Fact and Conclusions of Law (R. 16, 17). The instant appeal is an appeal from the judgment of the court wherein the causes of action of the appellant were dismissed on the ground that the defendant had pleaded and proved defenses under Sec. 9 and 11 of the Portal to Portal Act of 1947.

While the jurisdiction of the District Court to hear and try this action and of the Circuit Court of Appeals to entertain this appeal will be conceded by all, the following statutes expressly confer and grant jurisdiction:

Title 28 U.S.C.A., Sec. 41(8);

Title 28 U.S.C.A., Sec. 225(a).

STATUTE INVOLVED

The provisions of the Fair Labor Standards Act of 1938, as amended, Title 29 U.S.C.A., Sec. 201 to 219, and the provisions of the Portal to Portal Act of 1947, Title 29 U.S.C.A., Sec. 251, *et seq.*, pertinent to this appeal are quoted for the convenience of the court in Appendix A.

PLEADINGS

Appellant deems it unnecessary to reiterate here the pleadings and issues arising under plaintiff's amended complaint filed pursuant to the Fair Labor Standards Act, 29 U.S.C.A., Sec. 216(b) in the District Court of the United States for the State of Washington, Northern Division, pursuant to 28 U.S.C.A., Sec. 41(8). (Cf. R. 2, 3, Cause No. 11463). These issues were resolved in appellant's favor by the said District Court in Cause 11463. Subsequent, however, to the filing of briefs and argument in this court, but prior to decision, the Portal to Portal Act of 1947 was enacted by Congress, and under the terms thereof this court entered an order remanding this cause to the trial court in order to permit appellees to proffer pleadings thereunder (R. 7) as follows:

“V.

“That all contracts of employment between the plaintiff and the assignors of plaintiff and these answering defendants, and all wages and salaries paid thereunder, were approved and paid in good faith by defendants in conformity with and in reliance upon, administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit: the U. S. War Department and War Department Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such U. S. War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

“VI.

“That any act or omission of defendants under

the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, or to any of the assignors of plaintiff, was in good faith and in the reasonable belief on the part of the defendants that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended."

STATEMENT OF FACTS

(a) General

The appellant and his assignors worked for the appellee companies in the construction of certain Aleutian Island air bases during the years 1944 and 1945. As jobsite employees at the Aleutian base of operations for the appellee companies, the appellant and his assignors worked 70 hours a week, 10 hours each day. Each was paid for 8 hours per day for the first 6 days of the week at straight time rates.

Appellant brought suit under the Fair Labor Standards Act to recover for 12 hours time each week, admittedly not paid, and for additional half time for hours worked in excess of 40 hours each week. The appellant reduced its claim to judgment. On the present appeal, it stands admitted that the appellee companies violated the Fair Labor Standards Act and that the appellee companies were indebted to the appellants for both straight time and overtime compensation under that act.

The present appeal is to determine whether or not the appellee companies have exonerated themselves from their admitted liability by reason of their having pleaded and proved facts sufficient to sustain exon-

eration from liability under the terms of Sec. 9 and 11 of the Portal to Portal Act of 1947. The documentary evidence which appellees offered and proved upon the trial of this cause, and which the appellees contend is sufficient as to exonerate them from liability to the appellant under the terms of the Portal to Portal Act of 1947 is summarized in a stipulation and pretrial order that is a part of the record (R. 40 to 74). Succinctly stated, it was the position of the appellees that they received written communications from the U. S. War Department or the Corps of Engineers of the U. S. War Department, or the Wage Administration Agency of the U. S. War Department which they contend constitute regulations, orders, rulings, approvals and interpretations of such a character as to fall within the contemplation of Sec. 9 and 11 of the Portal to Portal Act of 1947, thereby exonerating the appellee companies from any liability to the appellant and his assignors. Those principal communications, material hereto, are classified as follows:

1. Prime contract and supplemental instructions relating to Uniform Contracts of Employment for non-manuals.

2. War Department Circular Letters Nos. 2236 and 2390 (Exhibits 14 and 15).

3. Contracting Officer Approvals of Defendants' pay schedules and policies (Exhibits 25 and 27).

4. War Department Wage Administration Agency Approval (Exhibit 16).

5. Miscellaneous specific communications and instructions relating to the foregoing exhibits and to

overtime pay policies generally (Exhibits 17, 18, 19, 43, 28, 44, 45, 34, 40, 24, 33, 41, 59, 58, 63, 20).

(b) Specific Documentary Evidence

The specific provisions of the written documentary evidence introduced by the appellees, which appellees contend operate to exonerate them from liability to the appellants by reason of Sections 9 and 11 of the Portal to Portal Act of 1947, are now set forth in the order in which the same were received by the appellee companies.

The prime contract executed by the defendant and the United States of America on September 30, 1943, Contract No. 202 (Exhibit 13 (R. 47)), provides in Article X, §1:

“(d) Conditions of employment, rates of pay for overtime and holidays will be as set forth in the employment agreements attached hereto and made a part hereof, Appendices D and E.

“(e) It is contemplated that work at the site will be carried out on the basis of two 10-hour shifts a day, 7 days a week.”

Appendix E of Exhibit 13 (R. 47) contains the following provisions:

“Article 2.—Compensation:

“a. Base Compensation. The employee is employed at a ‘base compensation’ rate of per * * *.”

“Article 8.—Prosecution of Work:

* * *

“b. Non-manual employees will be divided into the following groups determined by their weekly

base compensation: * * * (2) Group 'B' whose salaries are from \$50 to \$90 per week inclusive

* * *

* * *

"d. Group 'B' employees will be expected to work any reasonable number of hours during the first six days' work in the regularly established work week without payment other than the base compensation. They will be paid at two times the straight hourly rate for all authorized work performed on the seventh consecutive day the employee works in any regularly established work week."

Supplemental Agreement No. 8, being a part of Exhibit No. 13 (R. 47) dated August 1, 1944, provided that thereafter conditions of employment and rates of pay would be "issued, amended and approved from time to time by the contracting officer."

On August 21, 1944, the Contracting Officer (being an employee of U. S. Engineers, U. S. Army) wrote to the defendant in Exhibit 53 (R. 58) "to immediately place in use the revised Uniform Contracts of Employment for manual and non-manual personnel to be utilized for employment of personnel in Alaska." A second revision was issued on October 13, 1944, in Exhibit 54 (R. 58). Both Exhibits 53 and 54 contain the same provisions as the prime contract, Exhibit 13 (R. 47), with respect to the formula for overtime compensation.

The Contracting Officer furnished the defendant on February 14, 1945, Exhibit 60 (R. 60) which is a comparative summary of the various documents

theretofore transmitted by the Contracting Officer to the defendant relating to employment contract.

On June 6, 1945, the Contracting Officer wrote a supplement thereafter to the non-manual employees contract, Exhibit 66 (R. 62) which provided *inter alia* as follows:

"It is understood that the established work week at the initial place of work assignment consists of seven 10 hour days and that the base pay rate of \$....., stipulated in Article 2, item a, is full and complete compensation for the first six 10 hour days worked during the work week. * * *"

Circular Letter No. 2236 dated January 9, 1943, Exhibit 14 (R. 47 provided *inter alia* as follows:

"5. Requirements as to hours of work, over-time and leave allowances for non-manual employees * * *.

* * *

"b. For this purpose, non-manual employees will be classified in the following groups:

* * *

"(2) Group 'B' employees whose base salaries are between \$50.00 and \$90.00 per week, inclusive, except those included in Groups 'D' and 'E'.

* * *

"c. The base salaries of *all* employees of Groups 'A', 'B' and 'C' will be established on the basis of a minimum work week of 48 hours.

* * *

"e. Group 'B' employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. * * *."

Circular Letter No. 2236 was transmitted to the defendant on February 20, 1943, by Exhibit 19 (R. 49).

Article VII of the prime contract, Exhibit 13 (R. 47) provided as follows:

"The extent and character of the work to be done by the Contractor shall be subject to the general supervision, direction, control and approval of the Contracting Officer to whom the Contractor shall report and be responsible."

Exhibit 22 (R. 49) is a schedule of non-manual job classifications and salary ranges which was transmitted to the Contracting Officer, who responded with Exhibit 25 (R. 50) a portion of which reads as follows:

"You are advised that your letter with inclosures was forwarded to the Engineer, Alaskan Department, by letter dated 20 October, 1943, file SE 161 (Adak Depot 202.5) 1 PADBL 2Y. In first indorsement thereto, dated 24 October, 1943, the Engineer, Alaskan Department, approved the Organization Chart and Schedule without change and recommended that action be taken to adjust the salary range for Assistant Superintendents as proposed in your letter."

From time to time the defendant submitted changes in Exhibit 22 (R. 49) relating to job classifications and salary ranges, and received similar responses from the Contracting Officer. See Exhibit 29 (R. 41), Exhibit 31 (R. 51), Exhibit 37 (R. 53), Exhibit 38 (R. 53).

On November 5, 1943, Contracting Officer wrote

the defendant, Exhibit 25 (R. 50) stating *inter alia* as follows:

"In order to obtain approval for adjustment in an established salary range, it will be necessary that your office prepare appropriate request on forms prescribed by the Treasury Department for submitting to higher authority. The office will furnish the necessary forms and assist in forwarding your request through proper government channels." (Exhibit 25) (See also Exhibit 27)

Thereafter the defendant, with the help of the Contracting Officer, prepared applications to the Salary Stabilization Unit of the Treasury Department for approval of salary increases and pay roll policies, Exhibit 30 (R. 51) and Exhibit 32 (R. 52). See also Exhibit 35 (R. 52) where the defendant employed legal counsel. Exhibit 36 (R. 53) recites that the Salary Stabilization Unit application would be handled for the defendant by the War Department.

On April, 1944, an application for approval of the Wage Administration Agency of the War Department for salary ranges and to pay policies was submitted. Exhibit 42 (R. 54).

On April 27, 1944, the Wage Administration Agency issued Exhibit 16 (R. 48) familiarly called the Abersold Directive, a portion of which provided as follows:

"3. For this purpose, non-manual employees will be classified in the following groups:

* * *

"b. Group 'B'. Employees whose base salaries

are between \$50.00 and \$90 per week, inclusive, except those included in Group 'D' and 'E'.

* * *

"4. The base salaries of *all* employees of Groups 'A', 'B', 'C' and 'E' will be established on the basis of a minimum work week of 48 hours

* * *.

* * *

"6. Group 'B' employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation * * *." (Exhibit 16)

The Abersold Directive, Exhibit 16 (R. 48) also made its approval retroactive to September 15, 1943. A copy of the Abersold Directive was given the defendant on May 3, 1944, Exhibit 43 (R. 55) and Contracting Officer wrote the defendant to place it into effect immediately, Exhibit 48 (R. 56) and Exhibit 49 (R. 56).

December 7, 1943, the Adak Engineer wrote a memorandum, Exhibit 28 (R. 51) to defendant, a portion of which states:

"Non-manual employee not entitled to overtime, except on authorized seventh consecutive day of scheduled work week." (Exhibit 28).

Later, Exhibit 44 (R.) from the Engineer of the Alaskan War Department stated as follows:

"Executive Order No. 9240 limits payment of overtime to Class B employees (those earning over \$50 per week) to those worked on the seventh day only." (Exhibit 44).

Contracting Officer wrote Exhibit 34 (R. 52) February 13, 1944, as follows:

"It will be necessary for your non-manual employees to work any reasonable number of hours per day during the first six days of a week to fulfill their functions. However, no overtime benefits shall accrue on the first six days."

Defendant's project manager requested on March 18, 1944, authorization to pay non-manual employees in Group "B" overtime compensation for two (2) additional hours each day, Exhibit 39 (R. 53). The request was denied in Exhibit 40 (R. 53).

Prior to February, 1945, claims were being filed by employees with the defendant for additional overtime compensation based upon the Federal Labor Standards Act and the defendant was advised in Exhibit 59 (R. 60) by the Contracting Officer as follows:

"In response to our inquiry, the office, Chief of Engineers, has recently re-affirmed previous instructions that regulations of Circular Letter 2390 are currently applicable to operations of Cost-Plus-A-Fixed-Fee Contractors. In view of these instructions claims based on alleged violations of the Fair Labor Standards Act shall continue to be denied." (Exhibit 59)

And the defendant was furnished a copy of a telegram from General Robins, Acting Chief of Engineers, Exhibit 58 (R. 60) which reads as follows:

"Reurlet dated 22 January, 1945, subject applicability of Fair Labor Standards Act to CPFF contractors no regulations superseding circular letter 2390 have been issued. Claims of Employees of CPFF contractors paid in accordance

with C L 2390 should be investigated and reported as outlined in paragraph 750.23 Orders and Regulations." (Exhibit 58)

The defendant received a Litigation Procedure Manual, dated December 8, 1944, Exhibit 57 (R. 60) and April 5, 1945, Exhibit 65 (R. 62) advising them how the defendant should proceed in the event of a lawsuit.

The Contracting Officer wrote directly to W. R. Morrison, Chairman of the Employees Committee presenting such claim (Exhibit 63 (R. 62) which reads in part as follows:

"Analysis of the claims has revealed that the amounts represent wages allegedly due for time in excess of forty hours during the first six days of a week, computed at one and one-half the basic hourly rate, less any amounts already paid for time in excess of forty hours.

"After carefully considering the validity of the claims, it is the decision of the Contracting Officer that favorable action is precluded by existing War Department policies. The claims are accordingly denied in their entirety."

George A. Parks wrote a letter to his Senator, who transmitted it to the Administrator of the Wage-Hour Division and correspondence is found in Exhibit 55 (R. 60). He did not give his job description or the nature of the work the defendant was performing.

On June 22, 1943, the Contracting Officer wrote to the defendant, Exhibit 22 (R. 49) in part which reads as follows:

"1. a. Problems frequently arise under cost-plus-fixed fee contracts as to the applicability or

interpretation of laws or Executive orders affecting labor costs of the contractor.

* * *

“c. Since the War Department is responsible for the reimbursement of proper labor costs under the contracts, all such problems will be submitted through the contracting or commanding officer. Such procedure should govern problems under Executive Orders Nos. 9240, 9250 and 9301; Fair Labor Standards Act; Walsh-Healy Act; Davis-Bacon Act; Copeland Act; Eight Hour Law, and other laws or orders, past or future, affecting labor costs.” (Exhibit 21)

The plaintiffs concede that the Officers purporting to act as Contracting Officers were so authorized to act by the United States and as defined by Article XIX of the prime contract (Exhibit 13, R. 47).

A Corps of Engineers was created by Act of Congress, 10 U.S.C.A., §181, and was “charged with the direction of all work pertaining to the construction, maintenance and repair of buildings, structures and utilities for the Army.” 10 U.S.C.A. §181 lb.

In Army Regulations No. 100-70 dated November 5, 1942, Exhibit 12 (R. 46) the Authority and Responsibility of the Chief of Engineers is stated to include:

“1. Labor Relations.—As the maintenance of proper relations between management, labor and Government is essential to the efficient and expeditious conduct of construction work, the Chief of Engineers will maintain the necessary organization *to insure that proper labor relations are established and maintained, that labor laws are*

correctly administered and that proper wage rate structures and an adequate labor supply are maintained on all new work under his jurisdiction."

War Department Contract Form No. 3 (10 C.F.R. Cum. Supp. §81.1303, page 3618) provides as follows:

"b. For the purposes of this Appendix 'C', non-manual employees will be classified in the following groups:

"* * *

"Group 'B' Employees whose base salaries are between \$50.00 and \$90.00 per week, inclusive, except those included in Groups 'D' and 'E'.

"* * *.

"c. The base salaries of all employees of Groups 'A', 'B' and 'C' will be established on the basis of a minimum work week of 48 hours.

"* * *.

"e. Group 'B' employees will be expected to work any reasonable number of hours, six (6) days per week, without payment of additional compensation."

The National War Labor Board on November 26, 1942, issued its General Order No. 14 (29 C.F.R. Cum. Supp. §803.14; 7 F.R. 9861) providing *inter alia* as follows:

"(a) The National War Labor Board hereby delegates to the Secretary of War, to be exercised on his behalf by the Wage Administration Section within the Civilian Personnel Division, Headquarters, Services of Supply (hereinafter referred to as the 'War Department Agency') the power to rule upon all applications for wage and salary adjustments (insofar as approval

thereof has been made a function of the National War Labor Board) covering civilian employees within the continental limits of the United States and Alaska employed by * * * (3) government owned, privately operated facilities of the War Department.

“* * * .

“(h) The term ‘government-owned privately-operated facilities of the War Department’ shall include for the purposes of this order only those facilities (1) in which the War Department has contractual responsibility for the approval of payroll costs * * * .”

Here it should be made to appear that the War Labor Board’s jurisdiction arose only under the Wage Stabilization Act to approve wage increases, but expressly subject to complying with requirements of the Federal Labor Standards Act.

A similar direction was issued by the Commission of Internal Revenue (10 C.F.R. Cum. Supp. §81.977 aaa).

An employee of the defendant advised in December, 1943, that he was filing a complaint with the Wage-Hour Office, Department of Labor, that the defendant was violating the Wage-Hour Law (R. 482, 483).

Vice President Northcutt wrote Exhibit 74 (R. 68) which reads in full as follows:

"The District Engineer

United States Engineer Office December 23, 1943

700 Central Building

Seattle 4, Washington

Attention: Contracting Officer, Contract Co.

W-869-eng-7100

Contracting Officer, Contract No. W-45-108-eng-
202

Salary Conversion—Seattle Office Employees

44 Hour Basic Week to 40 Hour Basic Week

Dear Sir:

Subsequent to the inception of our Contract No. W-45-108-eng-202 and the resulting transfer of our Seattle office employees from Contract No. W-869-eng-7100 to the new contract, we received instructions in letter from your office dated October 29th, 1943 (File No. 248.3) Alaska 74 PADHF-3), to govern the conversion of the salaries of our Seattle office employees from the basic 44-hour week in effect on the old contract, to a basic 40-hour week. Other letters from your office bearing on the same subject are as follows: October 1st, 1943—File No. 161 (Adak Depot 202.5) 19 PADBL 7G

November 30th, 1943—File No. 161 (Adak Depot 202.5) 18 PADBL 7G

December 3, 1943—File No. 248.3 (Alaska) 96 PADBF-1.

It was our understanding that this conversion was mandatory for the new contract, and was therefore an obvious necessity for the old contract, because of concurrent work on both contracts by the same employees.

Since these instructions for salary conversion

have been put into effect, numerous questions and contentions have been raised regarding the correctness of the procedure outlined in the letters of instruction referred to, some of which have led to considerable dissatisfaction among our employees, and confusion as to the proper payroll procedure to be followed. We are advised by other contractors operating under the same instructions that they have encountered similar difficulties.

We have compiled a list of several specific questions which must be answered before our payroll procedure can be continued with some assurance of correctness. Before an attempt is made to provide us with final instructions on these many confusing points, however, the following fundamental questions must be authoritatively answered:

1. Should not all basic hourly rate computations under Contract No. W-45-108-eng-202 be arrived at by dividing the basic weekly rates paid under Contract No. W-689-eng-7100, by forty-four, since the basic weekly rates for all Seattle office employees under contract No. W-869-eng-7100 (classes A, B, C per "Policy of Office of Chief of Engineers In Relation to Working Conditions on Non-Manual Employees of All Cost-Plus-A-Fixed Fee Contractors." See District Engineer letters August 27th, 1942, File SE 3820 (Alaska Barge Terminal 7100.512, and September 6, 1942, File SE-3820 (Alaska Barge Terminal 7100.5)19), were based on a forty-four hour straight time work week?

2. Is there any reason why premium rates should have been paid for work in excess of forty

hours per week under Contract No. W-869-eng-7100?

3. Is the payment of premium rates for work in excess of forty hours per week mandatory under Contract No. W-45-108-eng-202?

4. Can the status of any Seattle office employees be changed, with regard to overtime earnings, without violation of Executive Orders No. 9240 and 9250, and if such changes can be made, is the classification of employees into classes as outlined in the policy of the Office of the Chief of Engineers governed by application of the old forty-four hour basic week or the new forty-hour basic week?

Specific instruction in detail are also needed to cover treatment of rates for janitorial and guard personnel for the O'Shea Building, which we have for some time been carrying on our payrolls.

Reimbursement for our Seattle office payrolls subsequent to November 1st, 1943, has been held in abeyance by your Project Auditor also, pending determination of the possibility of violation of Executive Orders 9240 and 9250, through the application of the instructions contained in your letter of October 29th, 1943.

We have also received a letter from the Regional Office of the National War Labor Board, dated December 20th, 1943, requesting our answer to complaint received alleging decrease in weekly rate of pay for our office employees as of November 1st, 1943. Copy of this letter, together with our reply is also attached herewith.

In view of the urgent necessity for answering the questions and complaints of our employees, and for establishing of proper payroll procedure

to be followed, as well as the necessity for advice as to the proper reply to make to the National War Labor Board, we would appreciate your earliest convenient consideration of the entire matter, so that we may be given authoritative instructions as promptly as possible for our future guidance. Please call upon us for any further assistance and cooperation we may be able to give in this connection.

Yours very truly,

GUY F. ATKINSON COMPANY

Ray H. Northcutt,

Project Manager."

On April 13, 1944, the Contracting Officer wrote Exhibit 75 (R. 68) which reads in full as follows:

PADBL-7

JIN/dbe/oo

5 April 1944

"161 (Alaska Barge

Terminal 7100.5)483 PADBL-9

13 April 1944

Guy F. Atkinson Company

1524 Fifth Avenue

Seattle, Washington.

Gentlemen:

Reference is made to your letter of 23 December 1943 on the subject of "Salary Conversion—Seattle Office employees 44-Hour Basic Week to 40-Hour Basic Week."

In your letter were several fundamental questions which we believe have been informally answered prior to this time but are now being formally answered for your records.

With the beginning of the Cost-Plus-Fixed-Fee work in Alaska a 44-hour work week was adopted for the Seattle Headquarters Offices of the Contractors. Salaries for non-manuals were subject to the approval of the Contracting Officer. The Contracting Officer was in turn responsible for the carrying out of policies dictated by the Chief of Engineers. The general policy of limitation on salaries was that they should not be in excess of earnings during the preceding twelve month period unless there was a definite increase in responsibility and scope of the employee's duties. Most of the new employees at that time had been previously employed on a 40-hour week basic and, in comparing their proposed salary with past earnings, they were given credit for what they have made on their previous job had they worked four hours on Saturday at time and a half. Over and above this, an increase over previous earnings up to 10 percent was effected in most cases, particularly, in the lower bracket employees. It then follows that the established salary did include allowance for premium pay on work in excess of 40 hours per week.

Therefore, it was perfectly correct and fair to the employees to readjust the basic week with recognition of the premium pay that would result from the new overtime allowances. The only reason why this was not apparent to everyone from the beginning was that, after allowance for overtime was first instituted the 44-hour week was an accepted fact and the payroll and audit procedure was simpler to figure using the basic hourly wage as $1/44$ of the weekly salary. Had we been strictly correct at that time the $1/46$ factor should have been used. The employees

have thus benefited by a procedure that was adopted merely for convenience.

In answer to the second question, there is no reason why premium rates should have been paid for work in excess of 40 hours per week unless the work came under the jurisdiction of the Fair Labor Standards Act. Many highly trained legal minds have pondered this question without arriving at a satisfactory conclusion. Obviously, the Chief of Engineers did not believe the Fair Labor Standards Act applied because the initial policy was that only straight time overtime be allowed for work in excess of 48 hours per week and then only to the lower grade employees. Grade B employees were allowed no overtime at all during the first six days of the week.

Circular letter No. 2390 is a result of this continuous argument about the application of the Fair Labor Standards Act. The wage and hour people claimed that it did apply and no authoritative answer could be obtained, so the legal staff of the Chief of Engineers effected a compromise acceptable to the wage and hour people. This provided pay for the lower bracket employees in conformity with the provisions of the Act, but did not accept the application of the Act over all, as demonstrated by the straight time overtime provisions of Grade B employees. The only explanation of this is that it was a compromise agreement that such employees were semi-supervisory. The act exempts supervisory employees but nothing is said about semi-supervisory employees, so the debate is still unsettled. The compromise did obtain the assurance that the wage and hour people would not press claims

under the Act because of failure to pay time and a half overtime for the B Group.

Your third question is answered by the above, except that the mandatory part is derived from the directive of the Chief of Engineers that contracts negotiated after May, 1943, shall use the compromise agreement.

The pay status of a Seattle Office employee has not changed insofar as the regularly scheduled work week is concerned. The status in regard to overtime earnings has been changed by direction of the Chief of Engineers. This office has proceeded under directives of the Chief of Engineers for many years without presuming to question the authority of such directives. Presumably, procedures under these directives have been satisfactorily cleared by the legal staff in Washington.

As to the second part of this question, the dividing lines between A, B, and C groups is based on the salary received for the 40-hour week in accordance with Circular Letter No. 2390. The adjustment of the basic salary is simply a matter of applying a factor that would result in no change in the earnings for the regularly scheduled work week. For your information, the old 44-hour basic work week has never been recognized by the Chief of Engineers. Circular Letter No. 2236 stipulated a 48-hour work week, but the 44-hour work week had been established so long in Seattle and the contractors resisted the adoption of the 48-hour schedule, so it was never put into effect.

In regard to complaints of your employees to the War Labor Board, the authorized representa-

tive of the Contracting Officer has discussed the problem at length with officials of the War Labor Board, particularly stressing the fact that the Contractor works under direction of the Contracting Officer in all such matters and that whatever action was taken was initiated by such direction. The War Labor Board's letter of 20 December is being answered by the Contracting Officer, explaining the conversion and the results thereof. It is anticipated that the controversy will be settled when this information reaches the War Labor Board.

Very truly yours,

GEORGE F. TAIT,

*Major, Corps of Engineers,
Contracting Officer."*

Mr. Northcutt stated that he knew during the entire period in question that the Fair Labor Standards Act was under the exclusive jurisdiction of the Wage-Hour Division Department of Labor (R. 197).

On May 1, 1944, an inspector of the Seattle branch office of the Wage Hour Division orally advised the defendant it was in violation of the Wage-Hour law and Mr. Northcutt was directly advised by the inspector that the defendant was in violation (R. 218, 223).

On September 19, 1944, the Branch Manager of the Wage-Hour office at Seattle wrote Exhibit 73 (R. 66) which reads in full as follows:

“U. S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC
CONTRACTS DIVISIONS

In reply refer to:
File No. 46-683-C

"Address all Communications to:
305 Post Office Building
Seattle 11, Washington

September 19, 1944

Mr. Ray H. Northcutt
Project Manager
Guy F. Atkinson Co.
1524 Fifth Avenue
Seattle, Washington.

Dear Mr. Northcutt:

Inasmuch as certain violations of the Fair Labor Standards act have been disclosed in a recent inspection of your operations, it becomes necessary to ask you to compute overtime due certain employees.

Violations occurred throughout your office employees and non-manual employees groups, both in Seattle and on the Alaska project. These people were paid a straight time wage only, and additional half-time is due them for all hours over forty in any work week. Sample computations and methods for arriving at the amounts due were left with you by our Mr. Cecil, Inspector on the case. The computations should include both present and past employees for the period upon which work was being done under Contract W-46-108-eng-202. These computations should be in our hands as soon as possible to enable us to clear up this matter without undue delay.

We shall, therefore, expect the computations to reach us before September 27, 1944, after which the case will be further processed.

Yours very truly,

WALTER T. NEUBERT /s/
Branch Manager."

The defendant forwarded Exhibit 73 (R. 68) to the Contracting Officer by Exhibit 76 (R. 68) dated September 21, 1944, and requested him to outline the defendant's course of action.

The Contracting Officer on October 3, 1944, in Exhibit 78 (R. 68) acknowledged receipt of the Neubert letter, Exhibit 73 (R. 66) and stated in part as follows:

"Since the obligation of the War Department and its contractors is not clearly defined by the Procurement Regulations, this matter was referred to the Director, Industrial Personnel Division, Headquarters, Army Service Forces, Washington, D. C. In an effort to get prompt information as to policy, we at first tried to outline the circumstances by long distance telephone on 27 September 1944 but Major Suffrin requested that detailed information be forwarded by air mail. This was done by letter of 28 September 1944 and an early reply is anticipated since we tried to impress them with the urgency of the matter.

You will be advised as soon as definite instructions are received."

(c) Oral Testimony

The oral testimony offered by the appellees consisted of the testimony of Vice-President Northcutt of the Guy F. Atkinson Company and John Irvin Noble, the contracting officer of the district office of the Corps of Engineers of the Seattle office, who was Chief of Contract Projects, Division of the Alaska Division of the District Office, during the period here in question (R. 372) and Mr. Clifford T. McBride, Business Man-

ager of the Birch, Morrison & Knudsen Company during the years 1944 and 1945 (R. 461). It was stipulated by the parties that

“(a) All evidence, documentary or oral, relating to any one of the defendants shall be deemed to relate to all of the defendants and all documents or communications sent to or received by one defendant shall be deemed to have been sent to, received by or come to the attention and within the knowledge of all other defendants. All information, knowledge, beliefs and acts of any of the defendants shall also be deemed to be the information, knowledge, beliefs and acts of all other defendants.” (R. 41)

Mr. Northcutt testified on direct examination that the appellees entered into a contract with the War Department (Exhibit 13) on or about September 20, 1943, covering the construction and employment here in question, and that all payments for labor and wages, including all overtime payments, to employees hired by the appellees to perform work under the contract were made and paid in accordance with the contractual stipulation of Exhibit 13, and that Exhibit 13 and its appendices with respect to matters of wages and salaries was in accordance with circular letter 2236 (Exhibit 14) and circular letter 2390 (Exhibit 15), and that all wages and salaries paid by the appellees to any of their employees was controlled by and in accordance with those exhibits (R. 183, 4, 5, 6, 8). Mr. Northcutt further testified that all wages and salaries paid by the appellee companies to any employees hired to perform work under the terms of the contract (Exhibit 13) were approved April 27,

1944, by the War Department, Wage Administrative Agency (Exhibit 16) and that the company fully complied with and adhered to the provisions of that directive (R. 185).

Mr. Northcutt further testified that he knew that the Fair Labor Standards Act was administered by the Wages and Hours Division Department of Labor and that he knew this fact in the year 1943 when the contract was executed (R. 97); that there was nothing in the Abersold directive (Ex. 16) which he understood to relate to the overtime rates prescribed by the Fair Labor Standards Act (R. 364). Mr. Northcutt also testified that there is nothing in any of the Exhibits 14 to 79, inclusive, which modified or induced appellee to deviate from the provisions of the prime contract (Ex. 13, Art. VIII, Subdivision D, Appendix E) (R. 365-6). He testified that he was familiar with procurement regulation No. 11 (R. 353-4-5), and that neither Exhibits 14 or 15 in any way modified that paragraph of the prime contract (R. 294). Mr. Northcutt testified that he knew that the burden was upon the company to obey and abide by all applicable laws and regulations of the U. S. under the very terms of the prime contract (Exhibit 13) (R. 272). Mr. Northcutt testified that never during the progress of the work on the contracts here involved was a request made to the War Department or for that matter to the Administrator, Wages and Hours Division, Department of Labor, for a ruling on whether the Fair Labor Standards Act did or did not apply; that the company never considered it appropriate or necessary to make such a request (R. 283-284).

Northcutt also testified that he was aware of the dispute concerning the applicability of the Fair Labor Standards Act (R. 288); that the company would not have gone contrary to the War Department's instruction on overtime matters even in 1943 unless it was established with absolute certainty that the company would have been violating the law by following the War Department's instructions and that the reason for such an attitude was that the company was required to abide by the provisions of the contract (R. 302).

Mr. Noble testified that he was the contracting officer in charge of the administration of the prime contract (Exhibit 13); that the appellee company complied with all the instructions and the directives of the contracting officer with respect to the operation of the contract (R. 398-9). Mr. Noble further testified that there was not a single writing of any kind or character amongst any of the exhibits which authorized him or the War Department to pass upon the question of whether the Fair Labor Standards Act covered or applied to the project on which these claimants worked (R. 452). Mr. Noble further testified that at no time was he requested by any of the companies to obtain a ruling from any of the officials of the Wages and Hours Division, Department of Labor, with respect to the coverage of the Fair Labor Standards Act over any of the contracts in litigation (R. 427). Mr. Noble further testified that nothing in any of the appellees' Exhibits 14 and 67 ever induced him to vary the provision of the prime contract prohibiting overtime payments (R. 421). He further testified that

at no time during the life and progress of the contracts herein involved was he ever called upon by anyone to investigate or determine the particular tasks and duties performed by any of the claimants in this case (R. 422). Mr. Noble further testified that during the life of the contract herein he never made a report of the duties or the tasks actually performed by any one of the claimants in this case to any office or officers (R. 422, 423).

Mr. McBride testified in substance that his company complied with all the instructions of the contracting officer and depended upon the prime contract which required such compliance (R. 469). Mr. McBride proceeded upon the assumption that a judgment under the Fair Labor Standards Act would be reimbursable under the terms of the prime contract (Exhibit 13 (R. 475)). Mr. McBride was of the opinion that his company was bound to follow the contract literally and that it did so (R. 478).

QUESTIONS OF APPEAL

By their appeal herein, appellant and his assignor claimants raise the following questions:

1. Where an employer company is found liable by a judgment entered in the U. S. District Court for certain overtime payments under the terms of the Fair Labor Standards Act, does the employer's reliance upon a prime contract between it and the Corps of Engineers of the U. S. Army constitute conformity in good faith with and reliance on "an administrative regulation, order, ruling, approval or interpretation of any agency of the United States," such as

would operate under the terms of the Portal-to-Portal Act of 1947, Sec. 9 thereof, retroactively to exonerate him from liability for violation of the terms of the Fair Labor Standards Act of 1938, as amended?

2. Where the employer company is found liable for the payment of overtime under the Fair Labor Standards Act of 1938, as amended, under a judgment of the U. S. District Court, has he shown such "good faith" sufficient retroactively to exonerate him under the terms of the Portal-to-Portal Act of 1947 where it appears that nowhere did he seek a legal ruling of any agency of the U. S., or of the Administrator of the Wages and Hours Division, as to whether his employment was subject to and covered by the Fair Labor Standards Act, and where the employer company neither sought nor obtained a ruling with respect to the applicability of the Fair Labor Standards Act of 1938, as amended?

3. Where the employer company has knowledge of the existence of the Fair Labor Standards Act and of its terms, and has knowledge of claims by certain of its employees that the Fair Labor Standards Act is applicable to its employment, and has knowledge that the position of the Corps of Engineers with respect to the non-applicability of certain provisions of the Fair Labor Standards act was never acquiesced in by the Wages and Hours Division administering the Fair Labor Standards Act, and that an unresolved controversy at all times existed between the War Department and the Wages and Hours Division with respect to the Act, and where the employer company took no steps to submit its employment classifications and

employment job descriptions to the Administrator of the Wages and Hours Division for a determination of the disputed question of coverage under the Fair Labor Standards Act, does such conduct on the part of the employer company amount to conformity in good faith with and reliance on any administrative regulation, order, ruling, approval or interpretation of any agency of the U. S. sufficient, under the terms of the Portal-to-Portal Act of 1947, retroactively to exonerate such employer company from liability under the Fair Labor Standards Act?

4. Where the provisions of a cost plus fixed fee contract entered into between an employer company and the War Department required the employer company not to pay overtime to certain employees for duties of a non-manual nature described therein (assumed by the employer company and the War Department to fall within executive and administrative exemptions of the Fair Labor Standards Act (29 USCA, Sec. 213 (a) (1))) and where it ultimately developed that such employees actually performed duties at the request of the employer outside the scope of such job classifications and such administrative and executive exemptions so as to render such employees subject to the overtime provisions of the Fair Labor Standards Act, and where such employer company never at any time submitted a report of the duties performed by such employees to any agency of the U. S. or to the Administrator of the Wages and Hours Division for the purpose of determining whether such duties actually fell within the terms of the Fair Labor Standards Act or not, under such circumstances does

such employer's conduct amount to conformity in good faith with and reliance on any administrative regulation, order, ruling, approval or interpretation of any agency of the U. S.?

5. Were the practices of the appellee companies wherein they failed to pay plaintiffs below overtime compensation as required by the Fair Labor Standards Act in "good faith," and did the appellee companies "have reasonable grounds for believing" that such practices were not in violation of the Fair Labor Standards Act.

6. Are Sections 9 and 11 of the Portal-to-Portal Act of 1947 as applied to Sections 7 and 16(b) of the Fair Labor Standards Act of 1938, as amended, unconstitutional as constituting a deprivation of property without due process?

SPECIFICATIONS OF ERROR

I.

The trial court erred in finding that all practices of the defendants, or any such practices, with respect to the payment of overtime compensation for all hours worked by the plaintiff-appellant and by the appellant's assignors in excess of forty (40) hours in any one work week were in good faith, in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretation of the following agencies of the United States, to-wit: the United States War Department, the Corps of Engineers of the United States War Department and the War Department Wage Administrative Agency, or any agency of the United States.

II.

The trial court erred in finding that all the practices of the appellees, with respect to payment of overtime compensation for all hours worked by the appellant and by the appellant's assignors, in excess of forty (40) hours in any one work week, were in good faith, and that the appellees had reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as amended.

III.

The trial court erred in finding that the appellees relied in good faith, or at all, upon anything except the contract which they had with the War Department of the United States (Exhibit 13).

IV.

The trial court erred in finding and concluding in Paragraph I of the conclusions of law and Sections 9 and 11 of the Portal-to-Portal Act of 1947 is constitutional.

V.

The trial court erred in finding and concluding in Paragraph II of the conclusions of law that the appellees are subject to no liability to the appellant, or to the appellant's assignors, for or on account of appellees' failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended.

VI.

The trial court erred in finding and concluding in Paragraph III of the conclusions of law that any paragraph of the findings of fact, Paragraphs 3, 5 and 7 of the conclusions of law and the judgment, hereto-

fore entered on the 28th day of May, 1946, in favor of appellant and appellant's assignors and against the appellees should be vacated, set aside and held for naught.

VII.

The trial court erred in entering judgment herein, dismissing the action of the appellant with prejudice.

ARGUMENT

Preliminary Statement

This is an action commenced "prior to" the enactment of the Portal-to-Portal Act of 1947 for services of plaintiffs below rendered several years prior to its enactment who were, as the trial court found, compensable under the Fair Labor Standards Act of 1938, as amended. Judgment for plaintiffs below was entered by the trial court May 28, 1946, prior to the Portal-to-Portal Act. Appellees seek to avoid their liability as judgment debtor by virtue of Sections 9 and 11 of the Portal-to-Portal Act of 1947. Section 9 undertook to permit the companies to exonerate their liability by pleading and proving that their violations of the Fair Labor Standards Act were the result of their reliance in good faith upon certain administrative rulings of any agency of the U. S.

In effect appellee companies, paraphrasing the applicable language of the Act, seek to plead and prove that to the extent to which they incurred liability under the terms of the Fair Labor Standards Act, they did so "in good faith in conformity with and reliance upon an administrative regulation, order,

ruling, approval or interpretation of an agency of the U. S.”

Their attempt to plead and prove *reliance* necessarily presupposes that as a result of such *reliance* they were misled unwittingly into violations of the Fair Labor Standards Act of which they were unaware. The inquiry here, therefore, is first: Upon what did they *rely*? Again, was that *reliance* upon an “administrative regulation, order, ruling, approval or interpretation of any agency of the U. S.”? If so, just what assurance did such agency furnish appellee companies that their acts and practices and that the particular services rendered by the plaintiffs below were *not* covered by or subject to the Fair Labor Standards Act? What reason did the appellee companies have for believing that such assurances embodied in such “regulation, order, ruling, approval or interpretation,” if any, constituted an official or authoritative construction of applicability or coverage with respect to the employment of the plaintiffs below under the terms of the Fair Labor Standards Act?

In resolving these questions, let us have in mind that the “good faith” and the “reliance” pleaded and urged by the appellee companies to exonerate their liability are principally, basically and for that matter exclusively predicated upon a “master contract” executed between the appellee companies and the War Department prior to the initiation of the construction constituting the subject matter of the employment here in question. That contract is spoken of and iden-

tified throughout the record as the Prime Contract, Exhibit 13.*

By its terms the prime contract provides for no overtime payment to non-manual employees. It must, however, be observed that it does not undertake to vary, modify or disregard the overtime provisions of the Fair Labor Standards Act. It does not require appellee companies to refuse overtime payment to these employees entitled to such overtime compensation by the Fair Labor Standards Act. On the contrary, the prime contract is bottomed upon an acknowledgment of the applicability and the force and effect of the overtime provisions of the Fair Labor Standards Act. It expressly requires the appellee companies as a contracting party to abide by and to obey all the laws of the United States.

It may fairly be said—and this conclusion is established by the evidence (Exhibit 75) (R.....)—that the parties to the prime contract assumed that non-manual employees such as the plaintiffs below were included under either the administrative or executive exemptions of the Fair Labor Standards Act. This assumption, however, was purely gratuitous for, as

*The record of course is replete with letters, correspondence and communications unilaterally exchanged between officers of the Corps of Engineers of the U. S. Army and the appellee companies, which correspondence presupposes the non-payment of overtime compensation (Exhibits 15 to 79). Such correspondence, however, in the light of the testimony hereinafter referred to is merely cumulative and does not in any respect serve to modify or deviate from the terms of the prime contract (Exhibit 13).

Exhibit 75 discloses, the parties were at all times aware that the Wages and Hours Division charged with the statutory duty of administering the Fair Labor Standards Act did not acquiesce therein.

Another factual consideration is to be observed. The War Department as a party to the prime contract neither reserved nor exercised any right to hire employees or to control the assignment of their employment duties. The managerial direction of employees and the assignment of the duties which they performed at all times resided in the appellee companies. These companies were free without any restrictions, under the terms of the prime contract, to assign plaintiffs below to duties actually exempt under the executive and administrative exemptions of the Fair Labor Standards Act and in accordance with regulations of the Administrator of the Wages and Hours Division charged with administering the contract or at its option could assign them to duties subject to the overtime provisions of the Act. The fact is that the duties actually assigned to be performed by plaintiffs below were subject to the Act's overtime provisions.

One further consideration is of special significance in approaching this problem. Appellee companies under their contract with the War Department were subject to no risk of loss or liability arising or accruing in the event of violation of the Fair Labor Standards Act. Should such penalties or liability arise, it was expressly understood between the contracting parties that the companies would be reimbursed therefor. This consideration will be further noticed subsequently in the course of our discussion.

We shall discuss the subject matter of this appeal under the following points and topics:

1. Neither the prime contract nor Exhibits 13, 14, 15 and 16, nor any of the exhibits upon which the appellee companies predicate their defense, constitutes an administrative regulation, order, ruling, approval or interpretation of the character contemplated by Section 9 of the Portal-to-Portal Act of 1947.

2. The contracting officer of the Corps of Engineers as the individual upon whom these appellee companies purport to have relied is not an agency of the United States competent or qualified to issue or promulgate an administrative regulation, order, ruling, approval or interpretation within the meaning of Section 9 of the Portal-to-Portal Act of 1947.

3. The record discloses no sufficient evidence of *good faith* or *reliance* such as would serve under the Portal-to-Portal Act to exonerate appellee companies from liability.

1. Neither the prime contract nor Exhibits 13, 14, 15 and 16, nor any of the exhibits upon which the appellee companies predicate their defense, constitutes an administrative regulation, order, ruling, approval or interpretation of the character contemplated by Section 9 of the Portal to Portal Act of 1947.

It is respectfully submitted that the employer appellees have produced no oral or written declaration which constitutes a "regulation, order, ruling, approval or interpretation" within the meaning of those terms as contemplated by Sec. 9 of the Portal-to-Portal Act of 1947. The terms "administrative regu-

lation, order, approval or interpretation" in Sec 9 are not defined by the Portal-to-Portal Act. However, it has been held that the dismissal by the administrator of the Wages and Hours Act of his appeal in an injunction suit that failed against an employer was not of itself an "administrative interpretation" within the language of Sec. 9 of the Portal-to-Portal Act. *Wolferman, Inc. v. Gustafson*, 169 F.(2d) 759, 764, CCA 8th, August 1948. In the cited case the court says, further:

"Even more concretely, the language 'administrative regulation, order, ruling, approval, interpretation' in Sec. 9 seems to us to have reference only to some formalized expression by the administrator and not to any conduct or action on his part from which an employer may undertake to make deductions.

"Such a formalism we believe inherent in the terms used. Indeed the very purpose of this part of Sec. 9 would seem to be to afford an employer security from penalty in his good faith reading of and justifiable reliance on express administrative declarations and pronouncements."

In the instant case the most that can be said of any of the exhibits offered by the appellees, which they contend constitute "administrative regulations, orders, rulings, approvals or interpretations of an agency of the United States," is that the documents in question are nothing more or less than the demands of a party to the contract—a promisee—under a cost-plus-fixed-fee contract. It is to be noted that all of the documents, without exception, are signed by an individual whose title is "contracting officer" or whose title is

“district engineer.” Certainly it can not be said that a contract or a letter from a contracting officer, or instructions to a contracting officer from his superiors, can be said to be of that genus of document which is contemplated in the terms “administrative regulations, orders, rulings, approvals or interpretations” of an agency of the United States. Applying the formalistic test set up by the 8th Circuit in the cited case, it is submitted that such documents fall far short of being of that genus required by Sec. 9 of the Portal-to-Portal Act of 1947. It is well settled law that the Fair Labor Standards Act of 1938, which is in effect amended by the Portal-to-Portal Act, is to be broadly construed in favor of the employees and strictly construed against the employer. *Phillips v. Walling*, 324 U. S. 490. The cited rule of construction has been carried over and applied to the construction of the Portal-to-Portal Act of 1947. *Reed v. Day & Zimmerman*, 73 F. Supp. 892; *Jackson v. Northwest Airlines*, 76 F. Supp. 121, 125; Code of Federal Regulations, Title 29, Ch. 5, Part 790, published in Federal Register Nov. 18, 1947, Sec. 790.2. This court will give great weight to the administrator’s opinion just cited. *Skidmore v. Swift & Co.*, 323 U.S. 134.

Applying the strict rule of construction to the terms “administrative regulations, orders, rulings, approvals or interpretations” in favor of the employee appellants necessarily excludes the words “contracts, letters, demands or interdepartmental communications” of the contracting officer. *Expressio unius exclusio alterius est*.

The formalistic test applied by the 8th Circuit in

the *Wolferman* case, cited *supra*, should be applied by this court.

2. **The contracting officer of the Corps of Engineers as the individual upon whom these appellee companies purport to have relied is not an agency of the United States competent or qualified to issue or promulgate an administrative regulation, order, ruling, approval or interpretation within the meaning of Section 9 of the Portal to Portal Act of 1947.**

It is submitted that the acts, conduct and communications of a contracting officer a civilian employee of the Corps of Engineers, which is a part of the Supply Forces of the United States Army, and directed to an employer under the terms of a cost-plus-fixed-fee contract, are not the *promulgations of an agency* of the United States within the meaning of Sec. 9 of the Portal-to-Portal Act of 1947 (R. 372, 373). In the instant case Mr. John Noble testified that General Nold signed the contract between the War Department and the employer and that he was one of the contracting officers who had the authority reserved to the contracting officer under the contracts here under consideration (R. 377). He performed all those functions of approval, certification or authorization that the terms of the contract between the **employer** and the War Department required to be done by the contracting officer (R. 379). He testified that he initiated essentially all of the instructions that were promulgated by the War Department to the contractors here in question (R. 380).

While the term "any agency of the United States" is not defined in the Portal-to-Portal Act, it clearly

appears from legislative definition of the term "agency" and other federal statutes and legislative reports. See definition of "federal agency," Federal Register Act, Sec. 4, 44 U.S.C.A. 304; definition of "agency," Administrative Procedure Act, Sec. 2(a), 5 U.S.C.A. 1001(a); Senate Document 248, 79th Congress, 2 Sess., 196, 247, 408; U. S. Gov't. Manual, 1947, 2d ed., Appendix A, 628. The best construction that may be given to the exhibits which the appellee contend are tantamount to governmental "administrative regulations, orders, rulings, approvals or interpretations of an agency of the United States," is that they signed a contract with an individual, General Nold, who it is true was connected with the War Department, and furthermore that they received at least 50 letters from individuals who denominated themselves "contracting officers," and who it is true were employees of the Corps of Engineers of the United States Army. However, that is a far cry from holding that these individuals were an agency of the United States upon whose fiat reliance in good faith could be placed. See *O'Riordan v. Nick F. Helmers, Inc.*, 8 Wages & Hours Cases 134, 137; *Jackson v. Northwest Airlines*, 76 F. Sup. 121.

It is significant to note that in the instant case the contracting officer testified that he was never requested by any of the defendant companies to obtain a ruling from any of the officials of the Wages and Hours Division of the Department of Labor with respect to the coverage of the Fair Labor Standards Act over any of the contracts herein involved (R. 419, 427). He further testified that during the life and progress

of the construction on the contracts herein involved, he was never called upon to investigate or determine the particular tasks or duties performed by any of the claimants in this case (R. 422). He further testified that he knew that there was nothing in the submission connected with the Abersold directive, Ex. 16, that related to the Fair Labor Standards Act (R. 419). Mr. Noble further testified that there was not a single communication in evidence sent by him or by the War Department to the appellee companies which authorized or which stated or purported to state that the War Department or the contracting officer had any authority to pass upon the question of whether the Fair Labor Standards Act covered or applied to the work of the claimants on the subject herein involved (R. 452).

It is submitted that under the facts the War Department neither purported to act nor did it in fact act as an "agency" of the United States within the meaning of Sec. 9. Quite the contrary, both the War Department and the contracting officer acting for the War Department were both in fact and in law the promisees under a contract with the appellee companies, and any demands made by the contracting officer or the War Department under that contract were both in fact and in law the demands of a promisee under a contract. To say that the demands of the War Department or of the contracting officer under such a contract are the official administrative promulgations of an agency of the United States, is to close one's eyes to the admitted fact, which stands out in the record, that the War Department and the con-

tracting officer acting for the War Department was a party to and a promisee under the contract. It is believed that an agency of the United States, as contemplated by Sec. 9 of the Portal-to-Portal Act, contemplates the acts and promulgations of an agency acting in its governmental capacity and not acting in its executive and contractual capacity.

The framers of the Portal-to-Portal Act did not see fit to define the word "agency." But certainly, the framers of the Act did not intend the demands of a contracting officer, a mere employee of a branch of the United States Army, to be the fiat of an "agency" of the United States government. It is respectfully submitted that the District Judge erred in holding that that War Department or its contracting officer acting in the contractual capacity as promisee under a cost-plus-fixed-fee contract was an "agency" of the United States within the meaning of that term as employed in the Portal-to-Portal Act of 1947. Cf. *Wolferman, Inc. v. Gustafson*, C.C.A. 8th, 169 F. (2d) 759.

3. The record discloses no sufficient evidence of good faith or reliance such as would serve under the Portal to Portal Act to exonerates appellee companies from liability.

Did appellee companies sustain the burden of proof resting upon them under their pleadings and under Section 9 of the Portal-to-Portal Act to establish that the "act or omission complained of" (violation of the Fair Labor Standards Act) was *in good faith in conformity with and reliance on* an administrative regu-

lation, order, ruling, approval or interpretation of any agency of the U. S.? Was there any such regulation or ruling warranting the appellee companies in believing that they were free from liability under the Fair Labor Standards Act? We submit that the record is entirely barren of anything of that character. There is no

- (1) administrative regulation;
- (2) administrative order;
- (3) administrative ruling;
- (4) administrative approval;
- (5) administrative interpretation

of any agency—least of all of the Administrator of the Wages and Hours Division—undertaking to instruct or advise appellee companies that they were free with impunity to disregard or violate the Fair Labor Standards Act. There is nothing upon which the defendants could *in good faith* rely as a justification for such violations; nothing, to use the lexicon language definitive of the term “rely,” upon which they could “rest with confidence or certainty” upon an assurance from any agency that the employment here in question was free from the coverage of the Fair Labor Standards Act.

There is no dispute, and it is clear from the testimony of Vice-President Northcutt, representative of appellee companies, and Mr. Noble, contracting officer for the Corps of Engineers, that neither the companies nor the Army Engineers at any time deviated from the terms of the original contract. They conformed literally to the contract and the failure to pay overtime was exclusively due to the contract pro-

vision with regard to non-manual and Group B employees. The various exhibits, they declared, which were in the form of letters and communications from the War Department to the contracting officer and from the contracting officer to the appellee companies, had no effect in changing the terms of the prime contract. Is such a contract, therefore, an "administrative regulation, order, ruling, approval or interpretation of an agency of the U. S."? We submit that it cannot be so considered. Congress in enacting Section 9 of the Portal to Portal Act of 1947 used careful, meticulous language to define the conditions under which the employer companies might absolve themselves from admitted liability for violation of the Fair Labor Standards Act. *Exoneration was not presumed*. A burden was placed upon the employer. He was compelled by the Act to prove reliance, not generally upon anyone connected with an agency of the U. S., but specifically upon an administrative regulation, order ruling, approval or interpretation of such agency. Congress did not include in enumerating conditions of exoneration the terms of a contract. It would be strained indeed to treat a contract such as the prime contract here in question as synonymous with Congressional language of "regulation, order, ruling, approval or interpretation." Having chosen to enumerate these particular conditions of exoneration, Congress thereby in effect excluded such a contract from the conditions upon which reliance might be predicated (Cf. the rule of *expressis-exclusio*).

It is clear too from the record that appellee companies relied upon the contract for a reason wholly

other than that of an assurance of their non-liability under the Fair Labor Standards Act. The contract in fact gave no such assurance. They relied upon the contract solely in order to entitle themselves to reimbursement in accordance with its terms (R. 478, 219, 475). Reliance of such a nature and for such a purpose cannot now be belatedly construed as a belief in good faith that the Fair Labor Standards Act had no application to them. It is apparent in fact that appellee companies were entirely indifferent to the applicability of the Fair Labor Standards Act. Any risk of liability incident to violation of the Act was entirely underwritten for them. They themselves assumed no responsibility. In the event it should be determined—as by the judgment of the trial court it was so determined—that the companies owed a liability under the Act, both by the terms of the contract and by the terms of the War Procurement Regulations, of which they were aware, they were entitled to reimbursement. They were indemnified.

The good faith contemplated in the statute must necessarily rest upon some criterion which has to do with the relationship between the appellee companies and these plaintiff employees. It contemplates an honest, intelligent reliance upon some regulation or order of a U. S. agency sufficient to justify a reasonably prudent business man that the employer owes no obligation for compensation to these plaintiff employees. There is obviously nothing in common between the obligation of the appellee companies to pay compensation to the plaintiff employees provided for under the Fair Labor Standards Act and the unrelated

right of the appellee companies to procure reimbursement from the U. S. in accordance with the terms of their contract.

Nowhere in the record is there any evidence, oral or documentary, of any "regulation, order, ruling, approval or interpretation" undertaking to construe the Fair Labor Standards Act as not applicable to the employment of these appellees. Vice President Northcutt related that in 1941 before the construction work here involved was initiated, he had a vague understanding, the source of which he did not recall, that the Fair Labor Standards Act did not apply to such construction. The companies were necessarily aware of the impact of the Fair Labor Standards Act. Procedure for reimbursement of costs arising by reason of its terms was called to the companies' attention by the Corps of Engineers in Exhibit 21. No attempt, however, was made by the Corps of Engineers to advise appellee companies whether or not the Fair Labor Standards Act applied in their construction and employment. Obviously, of course, it was not the function of the Corps of Engineers to administer or construe that Act.

It is clear from the evidence that the company never at any time had any assurance from any U. S. agency of the non-applicability of the Fair Labor Standards Act. On the contrary, they were definitely apprised by the U. S. Engineers that the Wages and Hours Division—that department which by Congress was charged with the administration of the Act—claimed the act to apply (Ex. 75). This alone, without taking into account other sources of information available

to the company with respect to the coverage of the Fair Labor Standards Act, was notice not that the act did not apply, but that the authoritative agency in charge of administering the act definitely construed it as applicable. This knowledge, alone, thus brought home to appellee-companies, is a conclusive and indisputable negation by the company of any reliance whatsoever in good faith or otherwise upon a "regulation, ruling, order, approval or interpretation" of non-liability under the Fair Labor Standards Act. Nor was this the sole source of information brought home to appellee companies of the position of the Wages and Hours Division, claiming applicability of the Fair Labor Standards Act to the construction employment here in question. Exhibit 73, a letter written by the Branch Manager of the Seattle office of the Wages and Hours Division of the U. S. Department of Labor, to Mr. Northcutt, was a direct, positive and affirmative notification to defendant companies of the applicability of the Act. Was this not sufficient to have induced a reasonably prudent business man to entertain a great deal of doubt of his right to avoid the obligations and liabilities imposed by the Fair Labor Standards Act? Would it not in fact have induced any ordinary prudent, reasonable business man to conclude to the contrary? Does it not dispel any inference now sought to be drawn *post litem motam* of good faith and reliance upon an assurance of non-coverage?

Let us note the companies' conduct upon receipt of this notification. It made no inquiry of any authoritative or competent official of the Wages and Hours

Division with respect to the problem involved. It merely referred it to the Seattle office of the District Engineer. In due course, some five or six months later, the Engineer's office replied, advising the company to persist in its refusal to pay compensation in accordance with the Fair Labor Standards Act, but likewise notified the company that its continued refusal to do so might be productive of litigation and instructions with respect to such prospective litigation were included in the communication (Exhibit 59).

Further knowledge on the part of the appellee companies, as well as the Army Engineers, of the imminency of litigation to enforce compliance with the Fair Labor Standards Act is to be found in Exhibits 57, 62, 65 and 79. Exhibits 20 and 21 conclusively show that appellee companies were aware of the fact that the Fair Labor Standards Act was administered by the Wages and Hours Division of the Department of Labor. Mr. Northcutt, representative of the appellee companies, likewise so testified (R. 9, 11). (See also Federal Register, Mar. 21, 1944, p., which in addition to prescribing litigation procedure sets forth the terms of the Fair Labor Standards Act.) How much good faith, therefore, could arise out of the company's failure to inform itself of the regulations, orders, and rulings of the particular agency of the U. S. charged by law with administering the Fair Labor Standards Act?

The truth of the matter is plainly evident both from the testimony of the company's representatives on the trial and from the exhibits in evidence. The company was totally unconcerned with the whole prob-

lem involved in the application of the Fair Labor Standards Act. Whether its terms applied or did not apply was a matter of total indifference to appellee companies. They felt no obligation to ascertain its effect upon their construction employment. They were safe in any event. They stood to suffer no loss and no ultimate liability in the event penalties or liabilities should accrue from failure to comply with its terms. They had complete and total indemnification.

Good faith toward these plaintiff employees; good faith in acting upon an assurance of any agency that the Fair Labor Standards Act had any relevancy to its business or employment can never stem from such equivocal conduct. Indemnification against the risks involved in violation of the Act cannot give rise to good faith. On the contrary, indemnification proceeds upon an assumption of liability.

Note the following sequence of facts with respect to the applicability and effect of the Fair Labor Standards Act which were, throughout the period of the contract in question, openly and easily available to the company:

- (1) The fact that the Fair Labor Standards Act, as amended, had been on the statute books of the U. S. since 1938;
- (2) The fact that it was administered by the Administrator of the Wages and Hours Division, who had published complete regulations and interpretative bulletins with respect to its coverage, which publications were easily available to appellee companies.*

*See, v.g., the "Wages and Hours Manual," 1943

- (3) The fact that as far back as 1943 the Act had been judicially construed as applicable to similar employment (*Timberlake v. Day and Zimmerman* (U.S. D.C., S.D., Iowa) 49 F. Supp. 28);
- (4) The publication of War Department procurement regulations in the Federal Register;
- (5) Personal knowledge by representatives of the defendant companies that the Wages and Hours Division administering the Act claimed its applicability to this particular employment;
- (6) Notification from an authoritative representative of the Wages and Hours Division that the Fair Labor Standards Act was applicable to the employees of the appellee companies;
- (7) Advice from the Corps of Engineers that the Fair Labor Standards Act was conceded as applicable to the appellee companies by the Wages and Hours Division;
- (8) Knowledge by the appellee companies that they might violate the Act with impunity since they were assured in any event of indemnification and reimbursement.

A mere recital of these facts and considerations is sufficient, we submit, to preclude a claim by appellee companies that they or their officers acting as reasonably prudent business men relied upon an assurance from any agency of the U. S. of the non-applicability of the Fair Labor Standards Act. The probative effect of these facts and of this evidence is totally to the contrary. They received no assurance of non-

(B.N.A.) p. 257, digesting interpretations of the Wages and Hours Division, in which similar construction work under the Army Engineers in the Caribbean was held subject to the F.L.S. Act.

applicability. They were not concerned with the question either of applicability or non-applicability. They chose not to conform to the Act with full knowledge of the Act, its coverage and of the fact that those in charge of its administration, the Wages and Hours Division, maintained that it applied to appellees. They assumed the risk involved in non-conformity to the Act entirely and with little concern with respect thereto for in any event they relied implicitly upon their right to reimbursement for liability arising therefrom and to indemnification. Such conduct is the very antithesis of "reliance in good faith" as those terms are understood in law.

A brief reference to applicable cases may, we believe, be helpful. Let us notice *Burke v. Mesta Machine Co.* (U.S. D.C. W.D., Penn., July 27, 1948) F. Supp., 8 Wages and Hours Cases 175. There an employer who erroneously excluded incentive bonus earnings of employees from computation of overtime pay, relying upon approval by an inspector of the Wages and Hours Division, was held in doing so not to have relied in good faith upon a ruling of the agency where in fact the advice of the inspector was inconsistent with the uniform and well publicized rulings and interpretations made by the Administrator of the Wages and Hours Division. Certain language of the decision is significant:

"It is apparent that Congress was concerned with the dilemma of those employers who sought interpretations of the Act, in accordance with well established administrative procedures that were open to them; if such interpretation subsequently proved to be erroneous the employer faced

a considerable liability. Having done all he could to obtain an authoritative statement of his obligations under the Act, the employer could lay a justifiable claim to equitable relief. * * *

In the footnotes, 3 to 6 in the margin of the opinion, the court sets forth convincing quotations from the interpretative statements of the members of Congressional committees active in bringing about enactment of the Portal to Portal Act, clearly evidencing a purpose to withdraw the benefit of the defense under Section 9 from those employers who had notice either of a construction by the Wages and Hours Division of the coverage of the Fair Labor Standards Act or notice even of a dispute between agencies in which the agency responsible for the administration of the Act claimed it to be applicable. Speaking specifically of good faith, the court declared:

“Good faith cannot be established as a simple fact. It is an ultimate fact, a conclusion to be drawn from the circumstances (cases). * * * It has been held to denote honesty of purpose, the actual existing state of mind, without regard to what it should be from given standards of law or reason. In others it has been defined as honesty of intention and freedom from knowledge of circumstances which ought to put the defendant on inquiry (cases).” Citing also Interpretative Bulletin, Portal to Portal Act, by Administrator, Wages and Hours Division, 29 Code Regulations, Chap. V, Part 790, Sec. 790-19, Nov. 1947.

“* * * The defense of good faith is intended to apply only where an employer innocently and to his detriment followed the advice as it was laid down to him by governmental agencies without

notice that such interpretations were claimed to be erroneous or invalid. I do not believe the defendant has satisfied the burden of proof required by the Portal to Portal Act."

The question of good faith was discussed in *Newspaper Guild v. Republican Publishing Co.* (June 21, 1948, U.S. D.C., Mass.) F. Supp., 8 Wages and Hours Cases, 140. There certain employees of the newspaper were held to be entitled to overtime compensation under the Act, as against the claim of the employer that they were exempted therefrom as executive or administrative employees. There, too, the employer invoked the good faith defense of the Portal to Portal Act, in this instance Sec. 11, to avoid liquidated damages for adjudicated liability. The employer as a member of the Association of Newspaper Publishers of America had been advised that the Act did not apply to its Springfield newspapers. The employer did not, however, consult legal advice on this issue nor did it obtain or rely upon a ruling of the Administrator of the Wages and Hours Division with respect thereto. The court said:

"The defendant was either not aware of or not interested in the fact that in April 1943 the Wages and Hours Division of the Department of Labor had published a manual of newspaper job classifications. The defendant, at least until late 1945, when a criminal indictment under the Act was filed against it, never consulted attorneys on the question of the application of the Act. So far as it is a question of fact, I find, therefore, that the omission of the defendant to pay overtime compensation was not in good faith

nor did the defendant have reasonable grounds for believing that its omission was not a violation of the Act in the sense that these terms are used in 29 U.S.C.A. 260."

And again

"I am convinced that an employer can no longer in good faith consider the Act inapplicable after Wages and Hours Division inspectors, chosen experts in the interpretation of the Act, have indicated their opinion by asking questions concerning the work week of the employees. To be sure the employer is not thus precluded from arguing the point through the hierarchy of the courts, but he cannot continue to claim good faith as that phrase is used in Sec. 11 of the Portal to Portal Act."

CONSTITUTIONAL ISSUE

We in this brief do not resurvey the entire field of constitutionality of the Portal to Portal Act. We concur and hereby adopt the argument made with respect thereto in the *Sessing* case, a companion case herewith. We do, however, devote ourselves here to an argument which is of first impression with respect to the Portal to Portal Act. It is simply this: That irrespective of the economic factors and conditions which warranted the enactment of the Portal to Portal Act of 1947 so far as purely "portal" or "fringe" activities are concerned, such factors, such economic conditions and such motivation do not support the constitutionality of the retroactive provisions of the Portal Act when applied to other than "fringe" or "portal" activities, that is, when applied as here to ordinary wage and hours cases involving overtime

rates of pay for work admittedly and actually performed. As to such ordinary overtime compensation cases, there is no evidence either in fact or in the preambulatory recital in the Act of any threat to the national economy, any danger of national bankruptcy or any national emergency whatsoever. These considerations, so far as they operated to move Congress to enact the Portal to Portal Act of 1947, applied solely to the "portal" or "fringe" aspects of the problem. Let us briefly consider this problem under the following topics:

1. Classification of Portal cases and ordinary cases.
2. Attack on findings.
3. Facts supporting findings.

1. Classification of portal cases and ordinary cases.

Congress itself in the Portal Act has clearly distinguished between these two classes of cases. In Sections 2 and 4 of the Portal Act the problem of fringe activities is dealt with *exclusively*, i.e., the *ordinary* cases are not therein covered. In Sections 9 and 10 ordinary cases are treated (although presumably portal activities might also be covered). In any event, the fact that Congress was able to differentiate between the types of cases disposes of the classification problem. We parenthetically call attention to the usual "separability" clause in Section 14.

2. Attack on findings.

Congress in Section 1 has enumerated many catastrophic conditions produced by what it conceived to be judicial misconstruction of the Fair Labor Standards Act, but has premised its finding thereof upon

the portal and fringe aspects rather than upon the ordinary cases of overtime compensation. Even where incidentally or collaterally retroactive legislation, serving to deprive these plaintiffs of their right theretofore vested in and to overtime payments under the Fair Labor Standards Act of 1938, is predicated upon such a recital of Congressional findings, it is nevertheless open to us to attack such Congressional findings and the facts presupposed therein by showing that in fact the supposititious conditions referred to do not actually exist. Upon these premises we propose to do so here *as applied to ordinary overtime wage-hour cases*.

Admittedly appellants are assuming a heavy burden for Congressional findings must be upheld by the courts "if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the law maker." * * * And if the court be "unable to say the finding is clearly unfounded," the court is "precluded from reviewing the legislative determination." *Radice v. New York*, 264 U.S. 292, 294 (1942); *Old Dearborn Co. v. Seagram Corporation*, 299 U.S. 183, 195 (1936).

The importance of the existence or lack of existence of facts to support the Congressional findings is simply this. Usually Congress cannot deprive one of his property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-416 (1922). Thus, usually the jobsite employees here involved cannot be deprived of their pay for the extra two hours a day they worked.

But apparently there has grown up a doctrine that

if the United States be faced with a great national emergency, then the national government may do anything to prevent the catastrophe. Thus, to prevent national bankruptcy or some other equivalent national emergency, Congress, so the theory goes, could validly destroy retroactively rights previously secured by the Fair Labor Standards Act. This doctrine received its greatest support from the Mortgage Moratorium case, *Blaisdell v. Home Building & Loan Association*, 290 U.S. 398, and inferentially in *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 242. Now, if no national bankruptcy or national emergency were to ensue exclusively from ordinary wage-hour judgments then there would be no need to apply the doctrine and as to the instant cases the law would be unconstitutional.

3. Facts supporting findings.

To answer the question: "What facts exist to support the findings?" We turn to the Congressional hearings (a copy of which, for convenience, we will lodge with the court at the time of argument) of which this court may take judicial notice. (We likewise will lodge a copy of the Congressional Record, which contains all the debates in Congress on the various bills which finally resulted in the Portal Act). During the then nine years of the Fair Labor Standards Act's existence there has not been one case of bankruptcy because the employer had to pay overtime or minimum wages prescribed by the Act.

The most that can be said from a reading of the entire record and hearings is that a few isolated industries had a few lawsuits filed against them amount-

ing to one or two per cent of the amount which had been filed for truly "portal" or "fringe" claims.

When the findings in Section 1 are removed from the court's consideration with respect to ordinary claims then the ordinary rules that the Supreme Court has invoked many times should be applied, namely, a retroactive destruction of property rights must be declared unconstitutional. See *Ettor v. Tacoma*, 228 U.S. 148; *Steamship Company v. Joliffe*, 2 Wall. 449; *Worthen v. Thomas*, 292 U.S. 426; *Coombes v. Getz*, 285 U.S. 434 (1932).

Some mention in the recent cases has been made that Congress in its exercise of its commerce power is unfettered by the due process clause of the Fifth Amendment. Such is simply not the law. The Fifth Amendment is inextricably intertwined with the commerce power. *North American Co. v. SEC*, 327 U.S. 147 (1946); *United States v. Carolene Products Co.*, 304 U.S. 144, 147 (1938); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589, Note 19 (1935). And see also Story on the Constitution (5th edition) Vol. II, Paragraph 1835 to 1891.

Likewise, the doctrine of frustration which the Attorney General of the United States has been arguing in these cases on the basis of *Louisville and Nashville Railroad v. Mottley*, 219 U.S. 467, wherein the Congress destroyed railroad free passes, and *Omnia & Co. v. United States*, 261 U.S. 502, wherein the United States was not held liable for the destruction of a steel contract, is not applicable here. To understand the *Mottley* case, one must read *New York Central and Hudson Railroad v. Gray*, 239 U.S. 583 (1916), in

which the holder of a free pass, given in consideration of personal services was held entitled to compensation in money in lieu of his free pass. Likewise, there is nothing in the *Omnia* case which says that the purchaser of the factory received nothing of value from the seller. It held merely that he could not receive payment in steel, but under the doctrine of the *Gray* case he could have sued for its reasonable value.

Nor does the *Mottley* case stand for more than that which was actually decided therein. There was there no retroactive deprivation of an accrued property right. Both the decision and the Act therein construed undertook to speak prospectively only and to forbid the enjoyment of the pass in question upon the grounds of a newly declared public policy. The decision expressly, however, reserved the contract right of the parties to have the value — albeit perhaps a commuted value — of the original contract. This case cannot in any wise be strained to the extent of supporting a holding in favor of the power of Congress merely by reason of its plenary power over interstate commerce at will to deprive parties of their contractual rights to property.

Hence, these employees, having rendered their service, are entitled under the doctrine of the *Gray* case to be compensated therefor.

Whatever, therefore, may have been the considerations which prompted Congress to suppress portal to portal or fringe claims, and to do so retroactively, such considerations have no force whatsoever when wrenched out of their context and applied to the standard ordinary overtime compensation provis-

ions of the Fair Labor Standards Act. On the contrary, all of the reservoir of fundamental constitutional law which has traditionally abhorred legislation amounting to retroactive deprivation of property applies here to protect the plaintiffs below in the enjoyment of their rights to such compensation as vested in their favor at the time that the services were rendered. We are not concerned here with the right of Congress in the exercise of its plenary power over commerce to abrogate such rights prospectively or to withdraw the benefit of the Fair Labor Standards Act *in futuro*. We submit, however, that the legislation here in question, both Section 9 and Section 11 of the Portal to Portal Act of 1947, which does not undertake to repeal the Fair Labor Standards Act of 1938, as amended, but merely to confer unilaterally upon certain employers the right to relieve themselves of liability, which accrued prior to its enactment, violates basic principles of due process. Plaintiffs below became entitled *eo instante* to their compensation at the end of each day and the end of each week that their services were rendered. Immediately then and there a debtor-creditor relationship between themselves and the employer companies arose. The company then owed them the sums herein found in their favor for overtime compensation under the Fair Labor Standards Act. Congress could not retroactively within the limits of due process, take these sums from the plaintiffs below which represented earnings for their services and thus unilaterally bestow them upon or award them to appellee companies.

CONCLUSION

Sec. 9 of the Act affords a defense to the employer, who pleads and proves that his failure

“* * * to pay * * * overtime compensation under the Fair Labor Standards Act of 1938, as amended, was (1) in good faith, (2) in conformity with, and (3) in reliance on any administrative (4) regulation, order, ruling, approval or interpretation of any (5) agency of the United States.”
(Numbers ours)

The instant appellees admit that they failed to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended; but contend they did so (1) in good faith (as evidenced by their knowledge and conduct at the time of the admitted violation); (2) in conformity with (as evidenced by the testimony herein) and (3) in reliance on (as evidenced by their knowledge and acts which they contend necessarily gives rise to an inference tantamount to “reliance”); (5) “an administrative regulation, order, ruling, approval or interpretation” (as evidenced by Exhibits 13, 14, 15 and 16, which appellants characterize as being documents of the genus referred to in the quoted words of the statute; (5) of any agency of the United States (appellants contend that the documents, Exhibits 13, 14, 15 and 16, transmitted to them through the medium of their “contracting officer” under their contract, are the promulgations of the nature described in (4) “considered together with Exhibits 1 through 12, necessarily make the “contracting officer” or “district engineer” “an agency of the United States.”

The appellees submit that the proof of the appellants as summarized above not only falls far short of the requirements of the statute (Sec. 9 and 11 of the Portal to Portal Act of 1947) which appellees seek to invoke to exonerate themselves from admitted liability, but actually fails to establish anything save performance of a contract, which performance the appellees knew or had reason to know violated the Fair Labor Standards Act in so far as these instant claimants are concerned.

The appellee companies were not obliged by the Corps of Engineers of the Army Supply Forces under their contract or because of any demand made upon them by the War Department, in its capacity as a contracting party, to employ and pay these claimants for one job description and actually work and use them in another capacity wholly different from that job description for which they were employed. The job description for which the appellee companies hired these people is one thing; what work they did is quite another. The latter, alone, is the focal fact which makes an employee subject to the Fair Labor Standards Act. It was the appellee companies who actually assigned to the employees work wholly different from their job description, which made these appellants subject to the Fair Labor Standards Act. The work actually done by these people was done at the behest of the appellees, not at the behest of anyone else. In fact, no one else save the appellees was ever informed as to the work actually done. Since it was the work the claimants herein actually did, and not the *label* pasted on it by the employer, that brought these claimants within

the operation of the Fair Labor Standards Act, and since only the appellees knew what work these appellants did, it is difficult if not logically impossible to believe that the appellee companies have made out any defense under the Portal-to-Portal Act of 1947.

In conclusion it is respectfully submitted that the judgment of the trial court should be reversed for the reasons advanced by the appellants herein, and that the judgment of the trial court as entered on May 28, 1946, favorable to these appellants as to all causes of action be reinstated and affirmed.

Respectfully submitted,

WETTRICK, FLOOD & O'BRIEN,
Attorneys for Appellant.

NOTE: This cause, involving as it does issues substantially identical therewith, was consolidated for trial below with causes 11984 and 11985, entitled *Sessing v. Birch, Morrison & Knudsen*, and *Kohl v. Birch, Morrison & Knudsen*. It is likewise here on appeal on a consolidated record and we desire hereby to subscribe to and adopt by this reference the brief filed therein by Messrs. McMicken, Rupp & Schweppe.

APPENDIX A

Title 29, U.S.C. §207.—(a) No employer shall except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce; * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Title 29, U.S.C. §216.—*Penalties: Civil and Criminal Liability.*—(b) Any employer who violates the provisions of Section 6 or Section 7 of this Act (§§ 206 or 207 of this title) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action (June 25, 1938, c. 676, §16, 52 Stat. 1069).

Title 29, U.S.C. §251.—*Findings of Congress; Declaration of policy; Purposes of Act.* (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended (§201, *et seq.*, of this title), has been interpreted judicially in disregard of long-estab-

lished customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for re-

funds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act (§251, *et seq.*, of this title) be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several states, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended (§201, *et seq.*, of this title), as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey (41:35, *et seq.*) and Bacon-Davis (40:276a, *et seq.*) Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining, and (3) to define and limit the jurisdiction of the courts. (May 14, 1947, c. 52, Part I, §1, 61 Stat. 84.)

Title 29, U.S.C. §258.—*Reliance on Past Administrative Rulings, Etc.* In any action or proceeding commenced prior to or on or after the date of the enactment of this Act (May 14, 1947) based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended (§201, *et seq.*, of this title), the Walsh-Healey Act (41:35, *et seq.*), or the Bacon-Davis Act (40:276a, *et seq.*), if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. (May 14, 1947, c. 52, Part IV, §9, 61 Stat. 88).

Title 29, U.S.C. §260.—*Liquidated Damages.* In any action commenced prior to or on or after the date of the enactment of this Act (May 14, 1947) to recover

unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended (§201, *et seq.*, of this title), if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in Section 16(b) of such Act. (§216(b) of this title) (May 14, 1947, c. 52, Part IV, §11, 61 Stat. 89).

No. 11984

No. 11985

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11984

WILLIAM LESLIE KOHL, *Appellant,*
vs.
S. BIRCH & SONS CONSTRUCTION COMPANY, a corpo-
ration, and MORRISON-KNUDSEN COMPANY, INC.,
a corporation, *Appellees.*

No. 11985

ARTHUR J. SESSING, *Appellant,*
vs.
S. BIRCH & SONS CONSTRUCTION COMPANY, a corpo-
ration, and MORRISON-KNUDSEN COMPANY, INC.,
a corporation, *Appellees.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

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DEC 13 1948

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM LESLIE KOHL, *Appellant,*
vs.

S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY INC., a corporation,
Appellees.

ARTHUR J. SESSING Appellant,
vs.

S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY INC., a corporation,
Appellees.

No. 11984

No. 11985

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

JURISDICTION

These cases were appealed to this court by the defendants in August, 1946, and were assigned docket numbers 11464 and 11465. A complete statement of the jurisdiction of the District Court and this court is set forth at pages 1-4 of the opening brief of defend-

ants-appellants in those appeals. These appeals were argued before this court May 15, 1947. On September 15, 1947, this court entered its order remanding these cases to the District Court upon the following terms:

“Upon motion of appellants in the above entitled cases all of the said cases are hereby remanded to the trial courts whence they came with instructions that appropriate and proper proceedings be permitted in the referred to court whereby appellants may proffer pleadings to the effect that all defenses permitted by sections 9 and 10 of the Portal-to-Portal Act of 1947 are put in issue. We herewith make no decision or intimation as to the merits of the proffer.”

This order was amended *nunc pro tunc* October 13, 1947, to relate to §11 instead of §10 of the Portal-to-Portal Act of 1947.

On October 31, 1947, the District Court entered its order reopening the cases for trial upon the issues specified in the order of this court remanding the cases, and permitting the defendants to file amendments to their answer and affirmative defenses (R. 8-10). The defendants accordingly served upon the plaintiffs a supplemental answer and affirmative defenses, November 5, 1947 (R. 11-12).

Trial upon defendants' supplemental answer and affirmative defenses was commenced December 8, 1947 (R. 77). March 2, 1948, the trial court entered judgment vacating its prior judgment of May 28, 1946, and giving judgment for the defendants and against the plaintiffs (R. 20-21). From this judgment the plaintiffs have now appealed to this court (R. 22).

In the interest of economy to all parties, it was stipulated between appellants and appellees that, as to all matters occurring in these cases prior to the order of this court quoted above, the records on appeal in causes numbered 11464 and 11465 should be and constitute part of the record on these appeals (R. 32).

The appellants, therefore, adopt *in toto* the statement of jurisdiction set forth in the opening brief of defendants-appellants in appeals number 11464 and 11465 at pages 1-4.

The only statute, the validity of which is involved in this appeal is the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §§251-262). The only sections of this statute which will be considered or which are pertinent to these appeals are §§9 and 11 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §§258 and 260). These sections read as follows:

“§258. Reliance on past administrative, rulings, etc.

“In any action or proceeding commenced prior to or on or after May 14, 1947, based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or

enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

"§260. Liquidated damages.

"In any action commenced prior to or on or after May 14, 1947, to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (b) of this title."

STATEMENT OF THE CASE

These cases are suits by the appellants to recover from the appellees unpaid overtime compensation due under the Fair Labor Standards Act, as amended, (Title 29, U.S.C.A. §§201-219). The facts which appellants maintain entitle them to such recovery are fully set forth in their brief in appeals numbered 11464 and 11465 wherein they appear as appellees. On the question of whether or not the appellants are entitled to the protection of the Fair Labor Standards Act, as amended (Title 29, U.S.C.A. §§201-219), the appellants adopt in full the additional statement of the case set forth at pages 1-5 of their brief in appeals numbered 11464 and 11465, in which they appear as appellees.

This brief will concern itself solely with the questions of whether or not appellants' suits are barred under §9 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §258) and whether or not the appellees are relieved from payment of liquidated damages by §11 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §260).

These cases were consolidated for trial with *Lassiter v. Guy F. Atkinson Co.* and others, all of which cases are now on appeal to this court. Before the trial on the supplemental answers and affirmative defenses it was recognized that the evidence offered by all defendants would be identical. Therefore, in the interest of economy and time, it was stipulated by and between all parties to all consolidated cases, that all documentary exhibits introduced on behalf of or against one defendant should apply equally to all defendants

and the knowledge imputed to one defendant should be deemed the knowledge of all defendants (R. 11983, 41). This stipulation was incorporated in a pre-trial order (R. 75).

Pursuant to this stipulation and pre-trial order, the documents from the files of the Guy F. Atkinson Co. were photostated and used as the evidence in all consolidated cases.

On January 9, 1943, by order of the Chief of Engineers of the War Department, Lt. Col. C. D. Barker, Chief, Labor Relations Branch, Construction Division, issued Circular Letter No. 2236 (Exhibit 14) relating to the policy of the Construction Division for non-manual employees on fixed-fee construction contracts, and providing that Group "B" employees, the group to which both these appellants belonged, would be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. The minimum work-week was 48 hours.

The pertinent portions of this circular letter are set forth in Appendix A. of this brief.

June 28, 1943, Major C. C. Templeton, Corps of Engineers, Chief, Personnel Branch, addressed a letter to the appellees, (Exhibit 21, R. 281-283) informing them that problems concerning the applicability of laws affecting the labor costs of the contractor frequently arise, and that since the War Department is responsible for the reimbursement of proper labor costs under these contracts, such problems should be submitted through the contracting officer. Such pro-

cedure should govern problems under the Fair Labor Standards Act. The letter assures the appellees that if a ruling is required from a civilian agency, it will be obtained by or through the War Department, and advises the appellees that requests for such rulings should be made through the contracting officer. The full text of this letter is printed as Appendix B to this brief.

On December 31, 1943, the appellees entered into the contract with the War Department which is referred to throughout these proceedings as the prime contract. This prime contract is in evidence in appeals numbered 11464 and 11465 as Defendants' Exhibit A-1, and is identical in form and substance with Defendants' Exhibit 13 in this appeal. This contract was what is known as a "cost-plus-a-fixed-fee contract" and provided, among other things:

"Article I. Statement of work

*"3. * * * In consideration of the undertaking of this contract, the contractor shall receive the following:*

"a. Reimbursement for expenditures as provided in Article II."

Article II of the contract pertaining to cost of work included the following provisions:

"1. Reimbursement for Contractor's Expenditures.

"The contractor shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified by the contracting officer, and as are included in the following items:

"a. All labor, materials, returnable containers and reels, tools, machinery, equipment, supplies, services, utilities, power and fuel necessary for either temporary or permanent use for the benefit of the work.

* * * * *

"h. Salaries of job managers, resident engineers, superintendents, timekeepers, foremen and other field employees of the contractor in connection with the work * * * No person shall be assigned to service by the contractor as superintendent of construction, chief engineer, chief purchasing agent, chief accountant or similar position in the contractors' field organization or as principal assistant to any such person until there has been submitted to and approved by the contracting officer a statement of the qualifications, experience, and salary of the person proposed for such assignment. The payment of any excess salary over such scheduled amounts shown in the approved salary schedule, Appendix C, attached hereto and made a part hereof *shall not be reimbursable* unless and until the contracting officer has so approved in writing." (Emphasis supplied)

Specifically referring to the subject of labor Article X of the Prime Contract contained the following pertinent provisions:

"1. Rate of Wages:

* * *

"(d) Conditions of employment, rates of pay for overtime and holidays will be as set forth in the employment agreements attached hereto and made a part hereof. Appendices D and E.

"(e) It is contemplated that work at the site

will be carried out on the basis of two 10-hour shifts a day seven days a week.” (Emphasis supplied)

Referring to Appendix E attached to the Prime Contract we find that this Appendix prescribes the Contractors Uniform Contract of Employment for non-manual employees and includes the following provision:

“Article VIII *d.* Group ‘B’ Employees will be expected to work any reasonable number of hours during the first six days worked in the regularly established work week without payment other than the base compensation. * * *”

Thus the terms of Circular Letter No. 2236 (Exhibit 14) were duly incorporated in the Prime Contract (Exhibit 13).

The appellees at all times followed and complied with the terms of the Prime Contract, (Exhibit 13) (R. 275, 478).

The appellees never accepted the offer of the War Department extended through exhibit 21, quoted above, by requesting the War Department to procure a ruling from the Wage and Hour Division as to whether or not the Fair Labor Standards Act applied to their employees. The appellees never requested a ruling at all (R. 283, 427, 475-476) and none was ever sought on their behalf (R. 430-431).

In response to a question from the court as to what the appellees did to keep from violating the Fair Labor Standards Act, the appellees’ witness, Northcutt, testified that prior to the execution of these contracts they had consulted their attorneys and the

national office of the Contractors' Association and were advised that original construction work was not covered by the act (R. 141-142).

On March 21, 1944, an Interdepartmental Agreement was published in the Federal Register as War Department Procurement Regulation 11, and as a preface recites:

“* * * (1) In order that any differences of opinion between the War or Navy Departments and the Department of Labor as to the legal position which should be taken by the Government in suits against cost-plus-a-fixed-fee contractors based upon the Fair Labor Standards Act may, be resolved, the War Department, the Navy Department, The Department of Labor and the Department of Justice have entered into the following agreement as to the administrative procedures to be followed to determine the position to be taken by the Government in such suits:” (p. 2992)

The agreement then goes on to describe the procedure of investigating, determining and processing claims under the Act made against cost-plus-a-fixed-fee contractors (Exhibit 81).

On the same day, there was published in 9 Federal Register, at page 2989, as Procurement Regulation 9, a resume of the provisions of the Fair Labor Standards Act with respect to minimum wages and maximum hours and overtime compensation, specifically as applied to cost-plus-a-fixed-fee contractors, providing for the reimbursement of overtime payments required by the Act as labor costs, reimbursement of amounts paid in settlement of claims under the Act

and providing for cooperation with the Wage and Hour Division when the latter agency might choose to investigate a contractor with respect to his compliance with the Act (Exhibit 81).

The appellees had actual as well as constructive knowledge of the contents of these Procurement Regulations (R. 354-355) and were aware of the dispute between the War Department and the Wages and Hours Division concerning the coverage of the Fair Labor Standards Act (R. 288).

Under date of April 13, 1944, Major George F. Tait, Corps of Engineers, Contracting Officer, replied to an earlier inquiry from one appellee in a letter marked Exhibit 75. The pertinent paragraphs of this letter read:

"In answer to the second question, there is no reason why premium rates should have been paid for work in excess of 40 hours per week unless the work came under the jurisdiction of the Fair Labor Standards Act. Many highly trained legal minds have pondered this question without arriving at a satisfactory conclusion. Obviously, the Chief of Engineers did not believe the Fair Labor Standards Act applied because the initial policy was that only straight time overtime be allowed for work in excess of 48 hours per week and then only to the lower grade employees. Grade B employees were allowed no overtime at all during the first six days of the week.

"Circular letter No. 2390 is a result of this continuous argument about the application of the Fair Labor Standards Act. The wage and hour people claimed that it did apply and no authoritative answer could be obtained, so the legal staff

of the Chief of Engineers effected a compromise acceptable to the wage and hour people. This provided pay for the lower bracket employees in conformity with the provisions of the Act, but did not accept the application of the Act over all, as demonstrated by the straight time overtime provisions of Grade B employees. The only explanation of this is that it was a compromise agreement that such employees were semi-supervisory. The Act exempts supervisory employees but nothing is said about semi-supervisory employees, so the debate is still unsettled. The compromise did obtain the assurance that the wage and hour people would not press claims under the Act because of failure to pay time and a half overtime for the B group."

The promulgation of Executive Order 9250 froze the wages and salaries paid by the appellees at the base obtaining on October 3, 1942. Since manual employees received overtime payments in accordance with Executive Order 9240, and, under the terms of the Prime Contract, (Exhibit 13), non-manual employees received no overtime except for the seventh day, the gross earnings of the manual employees exceeded the gross earnings of the non-manual employees, causing considerable dissatisfaction in the latter group (R. 116).

In order to meet this situation the appellees held conferences with representatives of the War Department and in Exhibits 22 and 26 requested approval of a new or revised salary structure (R. 122). The gist of the request was to establish a base pay for Group C and B non-manual employees that would

result in gross earnings to these employees greater in amount than the gross earnings of their subordinates (R. 127). The War Department replied to these requests by referring the appellees to the Treasury Department and the War Labor Board for approval of these salary and wage increases (Exhibits 25 and 27, R. 128).

The inequities in gross earnings between manual and non-manual employees made it difficult for the appellees to obtain qualified non-manual workers (R. 290-291, 416-417) yet, if the appellees increased or adjusted the base pay of non-manual employees without approval of the Treasury Department or the War Labor Board, the salaries and wages so paid *would not have been reimbursible* under the Prime Contract, Exhibit 13 (Exhibit 25, R. 238-239, 240-241, 418).

The appellees held numerous conferences with representatives of the War Department, the War Labor Board and the Treasury Department on this problem (R. 129), and finally the War Department verbally asked the appellee, Guy F. Atkinson Co., to make a uniform submission on behalf of all the appellees (R. 131). During all these conferences no reference whatever was made to the Fair Labor Standards Act (R. 237). In order to make the joint submission on behalf of all appellees, the appellee, Guy F. Atkinson Co., employed a Seattle attorney, Mr. Frank Mechem, to assist in the preparation of the submission (Exhibit 35). The object of this submission was solely *to comply with the Wage Stabilization Act* and secure approval of the actual employment of the working force (R. 262-263, 412).

Early in March, 1944, the representatives of the War Department advised the Guy F. Atkinson Co. to withdraw its submission since the Wage Administration Agency of the War Department would henceforth undertake the solution of the non-manual salary problem (R. 138-139).

Accordingly, the Guy F. Atkinson Co. referred all the data it had assembled on this question to the District Engineer of the War Department (Exhibit 36, R. 139). This information was embodied in Exhibit 42 and submitted to the Wage Administration Agency of the War Department (R. 139-140).

May 4, 1944, the appellees received a letter, Exhibit 43, enclosing the rulings of the War Department on non-manual wage and salary rates, Exhibit 16, over the signature of Dr. John R. Abersold, Chief of the War Department Wage Administration Agency (R. 144). This document and its appendices are referred to in the record as "the Abersold directive."

The first enclosure attached to and made a part of the Abersold directive is denominated "Statement of Policy Governing Cost-Plus-A-Fixed-Fee Contractors' Non-Manual Employees Working in Alaska." The second enclosure is the new salary schedule, and the third consists of job descriptions (Exhibit 16). Paragraph 6 of the first enclosure quotes verbatim and *without change* the language of the *Prime Contract* with reference to payment of overtime to Group "B" non-manual employees. *There is nothing in the Abersold directive which relates to the payment of overtime under the Fair Labor Standards Act* (R. 364, 419, 452, Exhibit 16).

The provision concerning overtime to Group "B" employees was copied from Circular Letter 2236 (Exhibit 14) as embodied in the Prime Contract (Exhibit 13, R. 391).

Upon receipt of the Abersold Directive (Exhibit 16) the salary ranges therein allowed were established by the appellees (R. 145, 468).

May 14, 1944, subsequent to all the foregoing events, the appellant, Sessing, was hired and on May 21, 1944, the appellant Kohl, was hired. Both appellants were employed under written contracts embodying the overtime provisions specified in the Prime Contract (Plaintiffs' Exhibit 6, R. Kohl 5-23, Sessing 5-21, appeals numbered 11464 and 11465).

On September 19, 1944, the Wage and Hour Division definitely notified the defendants by transmitting the letter which is designated in this case as Exhibit 73, that they were violating the Fair Labor Standards Act. The body of this letter reads as follows:

"Inasmuch as certain violations of the Fair Labor Standards Act have been disclosed in a recent inspection of your operations, it becomes necessary to ask you to compute overtime due certain employees.

"Violations occurred throughout your office employees and non-manual employees groups, both in Seattle and on the Alaska project. These people were paid a straight time wage only, and additional half-time is due them for all hours over forty in any work week. Sample computations and methods for arriving at the amounts due were left with you by our Mr. Cecil, Inspector on

the case. The computations should include both present and past employees for the period upon which work was being done under Contract W46-108-eng-202. These computations should be in our hands as soon as possible to enable us to clear up this matter without undue delay.

"We shall, therefore, expect the computations to reach us before September 27, 1944, after which the case will be further processed."

These appellants were still in the employ of the appellees when this notification was received, but no change was made in defendants' practice with respect to overtime.

The appellants left the jobsite at the end of the week commencing February 10, 1945.

During the entire course of the appellants' employment, they were paid in strict accordance with the terms of the Prime Contract (Exhibit 13) (R. 183, 185, 273-275, 241-242, 468-469). The appellees' witness Northcutt testified:

"Q. I had hoped to avoid having to turn to the contract. I am speaking now about prime contract, Exhibit 13, [428] Article 8, subdivision d, Appendix E. There is nothing in any of the exhibits that you described yesterday or today or during your testimony on the stand that resulted in your deviating from the provisions of the contract as I have just identified it, paragraph d, with respect to working any reasonable number of hours during the first six months [days] worked in a regularly established work week without payment other than the base compensation?

A. I think that is correct." (R. 366)

An examination of the documentary exhibits will disclose that all of the so-called "directives" received by these appellees from the War Department are addressed either to one appellee specifically, or to all CPFF *contractors*.

After the receipt of Exhibit 21, quoted in Appendix B, the appellees never requested a ruling from either the War Department or the Wage and Hour Division as to whether or not their employees were covered by the Fair Labor Standards Act.

"Q. (By MR. FLOOD): Mr. Northcutt, you never during the progress of the work on Contract 202 or 7100 requested through the War Department a ruling from a civilian agency on whether or not the Fair Labor Standards Act did or did not apply?

A. We never considered it appropriate or necessary." (R. 283)

Mr. Noble, the Contracting Officer, and Mr. McBride, the business manager of these appellees testified to the same effect (R. 418-419, 427, 475-476). Mr. McBride's testimony was:

"Q. And you never made any inquiry with respect to whether any of the plaintiffs in this action who are employees of the BMK Company, were or were not covered by the Act, did you?

* * * * *

Q. (By Mr. Flood—Continuing): During the course of their employment from January, '44, to February, '45. A. Not that I recall." (R. 475-476)

It will be recalled that the Procurement Regulations (Exhibit 81) in March and Exhibit 75 in April,

1944, advised the appellees that the applicability of the Fair Labor Standards Act to their employees was a matter of dispute between the War Department and the Wage and Hour Division.

Exhibit 75, quoted above in part was the *only* instruction the Contracting Officer ever gave to the appellees concerning the Fair Labor Standards Act. Mr. Noble, the Contracting Officer testified:

“(Question (By MR. DEGARMO): Mr. Noble, either prior to the Abersold submission or subsequent thereto, did you make any statement as Contracting Officer to the contractors with reference to the applicability of the Fair Labor Standards Act to the work in which they were employed—

‘Answer: No.’)

A. No.

Q. You do not wish to adhere to that answer?

A. No.

Q. Will you state, first whether any instructions by you to the contractors to which you may refer were either oral or in writing?

A. Any instructions?

Q. ‘Any statements’ perhaps I should say, rather than instructions.

A. Well, in writing this Exhibit 75. [465]

Q. Were there any oral?

A. No, none that I know of.” (R. 395)

The appellees went to a great deal of trouble to obtain adjustments in base pay so as to secure a qualified non-manual force (R. 290-291, 416-417) and they were punctillious in complying with the terms of Executive Order 9250, because failure to so comply

would have resulted in a withholding of reimbursement (R. 239, 417-418).

Compliance or non-compliance with the Fair Labor Standards Act made no financial difference to the appellees except in so far as the War Department might withhold current reimbursement for costs (R. 218-219).

As long as the appellees complied with the terms of their Prime Contract, they were assured of current reimbursement (R. 268-271).

Had the appellees paid overtime as provided in the Fair Labor Standards Act, without first obtaining a ruling through the War Department from the Wage and Hour Division, they would not have been currently reimbursed (R. 331, 442-446, 477-478, Exhibit 13).

They were assured by the procurement regulations (Exhibit 81) that any amounts they paid in settlement of claims under the Fair Labor Standards Act or in satisfaction of judgments for such claims would be fully reimbursed, and the appellees have, at all times, anticipated reimbursement for judgments that might be paid as a result of this litigation (R. 271). Mr. McBride testified:

“Q. Did you request the advice of the Contracting Officer as to whether or not a judgment for overtime compensation [591] under the Fair Labor Standards Act would be reimbursible by the United States Government?

A. Not that I recall. We assumed it would be, under the terms of our contract.” (R. 475)

The appellees contend that their payment of wages in accordance with Circular Letter 2236 (Exhibit 14), the Prime Contract (Exhibit 13), and the Aber-sold Directive (Exhibit 16) proves that their failure to pay overtime to these appellants was in good faith in conformity with and in reliance upon administrative regulations, orders, rulings, approvals, and interpretations of an agency of the United States, and hence they have proven a defense under §9 of the Portal-to-Portal Pay Act, of 1947 (Title 29 U.S.C.A., §258).

The appellees further contend that their compliance with all directions of the War Department with reference to payment of wages and preparation of payrolls demonstrated that their failure to pay overtime to these appellants was in good faith and that the total evidence introduced at the trial shows that they had reasonable grounds for believing that their failure to pay overtime to these appellants was not a violation of the Fair Labor Standards Act, hence they have proven a defense to the imposition of liquidated damages under §11 of the Portal-to-Portal Pay Act of 1947 (Title 29 U.S.C.A., §260).

The appellants contend that none of the documents on which appellees purport to have relied or with which they complied constitutes an administrative regulation, order, ruling, approval, or interpretation of an agency of the United States; that the failure of the appellees to pay overtime to these appellants as provided by the Fair Labor Standards Act was not in good faith in conformity with or reliance upon any such regulation, ruling, order, etc., and that on the

contrary, the evidence affirmatively shows that the failure of the appellees to pay overtime to these appellants in accordance with the Fair Labor Standards Act was not in good faith and that the appellees did not have reasonable grounds for believing that their failure to pay overtime to these appellants was not a violation of the Fair Labor Standards Act. Hence the appellants contend the appellees have not proven a defense under either §§9 or 11 of the Portal-to-Portal Pay Act of 1947 (Title 29 U.S.C.A., §§258, 260).

SPECIFICATIONS OF ERROR

1. The trial court erred in entering Finding of Fact No. I, reading as follows:

“All practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, in conformity with and in reliance on Administrative regulations, orders, rulings, approvals and interpretations of the following agencies of the United States, to-wit, the United States War Department, the Corps of Engineers of the United States War Department, and the War Department Wage Administration Agency.”
(R. 18)

The above-quoted Finding of Fact No. 1 is erroneous for the reason that the documents with which the appellees conformed and upon which they assert they relied do not constitute administrative regulations, orders, rulings, approvals or interpretations of any agency of the United States, and for the further reason that the record affirmatively shows that the

payment of wages in conformity with and in purported reliance upon the documents in evidence was not in good faith.

2. The trial court erred in entering Finding of Fact No. II, which reads as follows:

“All practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, and that the defendants had reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as Amended.” (R. 18)

The above-quoted Finding of Fact is erroneous for the reason that the record affirmatively shows that the practices of the appellees with respect to the payment of overtime compensation to the appellants were not in good faith and that the appellees had no reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act.

3. The trial court erred in entering Conclusion of Law No. I, which reads as follows:

“That the Portal-to-Portal Act of 1947 is, and Sections 9 and 11 thereof are, constitutional.” (R. 19)

The foregoing Conclusion of Law is erroneous for the reason that, as applied to these appellants, Sections 9 and 11 of the Portal-to-Portal Act of 1947 (Title 29, U.S.C.A., §§258-260) deprive these appellants of their rights under the Fifth Amendment to the Constitution of the United States.

4. The trial court erred in entering Conclusion of Law No. II, which reads as follows:

“That defendants are subject to no liability to the plaintiff for, or on account of defendants’ failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as Amended.”
(R. 19)

The above-quoted Conclusion of Law is erroneous for the reason that the appellees failed to establish by competent proof the allegations of their supplemental answers and affirmative defenses, and for the further reason that the statute upon which said supplemental answers and affirmative defenses purport to be based, namely Sections 9 and 11 of the Portal-to-Portal Act of 1947 (Title 29, U.S.C.A., §§258 and 260) are unconstitutional since they conflict with the Fifth Amendment of the Constitution of the United States (R. 19).

5. The trial court erred in entering the Conclusion of Law No. III vacating its Findings of Fact, Conclusions of Law and Judgment heretofore entered on the 28th day of May, 1946, for the reasons hereinbefore and hereafter set out (R. 19).

6. The trial court erred in entering Conclusion of Law No. IV to the effect that the action of these appellants should be dismissed with prejudice, said Conclusion of Law being erroneous for the reasons hereinbefore and hereinafter set forth (R. 19).

7. The trial court erred in entering its supplemental judgment in favor of the defendants (R. 20 to 21).

ARGUMENT

I.

SECTION 9 OF THE PORTAL-TO-PORTAL PAY ACT
OF 1947 (TITLE 29, U.S.C.A. §258).

§9 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A., §258) reads as follows:

“§258 Reliance on past administrative rulings, etc.

“In any action or proceeding commenced prior to or on or after May 14, 1947, based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, *if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged.* Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.” (Emphasis supplied)

In these cases the act or omission complained of is the failure of the appellees to pay overtime to the appellants in accordance with the following section of the Fair Labor Standards Act (Title 29, U.S.C.A., §207 (a) (3))

“§207 Maximum hours.

“(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—* * * *

“(3) for a work-week longer than forty hours after the expiration of the second year from such date,

“unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”

In order to be relieved of liability for the failure to pay overtime as required in the above-quoted section of the Fair Labor Standards Act, an employer must plead and prove the following: That the failure to pay overtime, as provided in the above-quoted section of the Fair Labor Standards Act was (1) in good faith in conformity with and in reliance on (2) any administrative regulation, order, ruling, approval or interpretation (3) of any agency of the United States (4) or any administrative practice or enforcement policy of any such agency (5) with respect to the class of employers to which the appellees belonged. Finding of Fact No. I (R. 18) eliminates from our consideration reliance upon or action in conformity with any administrative practice or enforcement policy and limits our inquiry to whether or not the appellees have proved that their failure to pay overtime to the appellants was in good faith, in conformity with, and in reliance on an administrative regulation, order, ruling, approval or interpretation of an agency of the United States.

II.

**THE APPELLEES HAVE PROVED NOTHING BEYOND
COMPLIANCE WITH AND RELIANCE UPON
A CONTRACT.**

A. Compliance with and reliance upon a contract does not establish a defense.

Section 9 of the Portal-to-Portal Act of 1947 (Title 29, U.S.C.A., §258) provides that a defendant may be relieved of liability for failure to pay overtime compensation under the Fair Labor Standards Act if he pleads and proves that his action was in good faith and conformity with and in reliance on any administrative regulation, order, ruling, approval or interpretation of any agency of the United States. Thus §9 creates an immunity under certain conditions for acts which would normally be within the ambit of the Fair Labor Standards Act.

In Broom's Legal Maxims, page 663, we read:

“A statute, it has been said, is to be so construed, if possible, as to give sense and meaning to every part; and the maxim was never more applicable than when applied to the interpretation of a statute, that *expressio unius est exclusio alterius*. * * *”

and again at page 666:

“Lastly, where a general Act of Parliament confers immunities which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law; for the introduction of the exemption is necessarily exclusive of all other independent extrinsic exceptions.”

These rules were adopted and applied by the Supreme Court of Virginia in *Whitehead v. Cape Henry Syndicate, et al.*, 105 Va. 436, 54 S. E. 306, 308. In other words, it is the intention of Congress as expressed in the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A., §258) to relieve from liability under the Fair Labor Standards Act where the employer can plead and prove that he, in good faith, acted in conformity with and relied upon the enumerated types of directions and only those. Had it been the intention of Congress to grant relief from the operation of the Fair Labor Standards Act where employers in good faith conformed to and relied upon a contract with an agency of the United States, the Congress would have so stated.

B. None of the documents on which defendants allege they relied constitutes an administrative regulation, order, ruling, approval, or interpretation of an agency of the United States.

“The terms ‘administrative, regulation, order, ruling, approval, or interpretation’ in the above statute imply a command or direction authoritatively given for a general course of action, applying to all alike. *Carolina Aluminum Co. v. Federal Power Commission*, 4 Cir., 97 F.(2d) 435, 436; *Osborne v. Johnston*, 9 Cir., 120 F.(2d) 947; *Christopher v. Mayor etc. of City of New York*, 13 Babr., 567, 573; 53 C.J., p. 1178).” *Semeria v. Gatto*, 75 N.Y.S.(2d) 140, 143.

The general statement as to the effect of the Portal-to-Portal Act of 1947 issued November 18, 1947, by the Administrator of the Wage and Hour Division,

(12 F. R. 7655), analyzes the foregoing terms with particularity. The attention of the court is respectfully directed to Sections 790.17 and 790.18 of this statement.

The weight to be accorded the Administrator's opinions is described thus in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. ed. 124:

"We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." (p. 140).

The terms "regulation" and "order" are interpreted by the Administrator to connote the authoritative rules issued pursuant to statute by an administrative agency, which have the binding effect of law, unless set aside upon judicial review. Clearly, not one of the documents with which appellees claim they acted in conformity or upon which they claim that they relied falls into those categories. From the prime contract (Exhibit 13) down to the last letter, there is not one rule which purports to have the binding effect of law. The provisions of the prime contract with respect to labor and the uniform employment contract attached thereto as Appendix "E" merely state the terms under

which a specific construction contract is let, and in no respect purport to establish legal rules of general application. In violating the terms of these documents the appellees could have incurred no legal sanctions whatever, but such a violation would have been merely a breach of contract resulting in the refusal of the War Department, as a contracting party, to reimburse the refractory appellee for his current costs.

The term "interpretation" is construed as being a statement by an agency which indicates its present belief concerning the meaning of applicable statutory language. Not one of the documents offered by the appellees even purports to construe the meaning of the language of the Fair Labor Standards Act or its applicability to these appellants, and the Contracting Officer expressly disclaimed any intention to do so (R. 452).

The term "ruling" embraces letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries. While the documentary evidence offered tends to show that the appellees inquired concerning the applicability of the Fair Labor Standards Act, the evidence is conclusive of the fact that they never received an answer to their inquiries or any opinion at all except that the War Department did not know (Exhibit 75).

"Approval" appears to be a term of art connoting the granting of licenses, permits, certificates or other forms of permission by an agency, pursuant to statutory authority. In this case we find no affirmative grants of permission to operate outside the scope of the Fair Labor Standards Act, or approval of any

course of conduct as being proper under any statute, but rather approval of a certain course of conduct *solely* as being in compliance with the terms of a contract. This point is illustrated throughout the evidence by the fact that whenever the agents of the War Department did not "approve" an act of a defendant, reimbursement was withheld, but no legal sanction was ever threatened or imposed. Moreover, the War Department at no time possessed or claimed to possess the statutory authority to approve any wage and hour arrangement, but, on the contrary, offered to assist the appellees in obtaining approval from the civilian agencies authorized to grant such (Exhibit 21).

The foregoing interpretations of the administrator are strongly fortified by the opinion of the District Court for the Northern District of Illinois, Eastern Division, filed September 23, 1948, in the case of *Bauler v. Pressed Steel Car Co.*, 15 Labor Cases, Para. 64,751, where that court said:

"* * * On the same principle, I think that an employer, to come within the protection of an administrative approval or interpretation, must have followed the familiar routine of submitting a particular problem to the head of the agency for a ruling or opinion. An opinion letter of the head of the agency or his counsel, ruling on the question, interpreting the section of the statute in question in the light of the facts of the employer's situation or approving the employer's interpretation of the law, would come within the meaning of this section. I think nothing less will do. * * *"

It will be observed from an examination of the documentary evidence in these cases that the communications of the War Department introduced by these appellees in support of their defense under §9 are either addressed to one appellee or to all CPFF contractors. There is not one document with which the appellees contend that they conformed or upon which they contend that they relied which purports to control or direct the conduct of anyone except a contracting party. The testimony conclusively demonstrates that the conduct of the appellees in failing to pay overtime in accordance with the Fair Labor Standards Act was dictated solely by the effort and desire of the appellees to comply with the terms of the prime contract.

C. The War Department as a Contracting Party is not an administrative agency.

The United States, as a contracting party, does not act as an administrative agency in administering or interpreting the laws of the nation, but acts solely as a contracting party the same as if it were a private individual.

United States v. Bank of the Metropolis, 15 Pet. 377, 10 L. ed. 774;

The Floyd Acceptances, 7 Wall. 666, 19 L. ed. 169;

Garrison v. United States, 7 Wall. 688, 19 L. ed. 277;

Cooke v. United States, 91 U.S. 389, 23 L. ed. 237;

United States v. Spearin, 248 U.S. 132, 63 L. ed. 166, 39 S. Ct. 59;

United States v. National Exchange Bank,
270 U.S. 527, 70 L. ed. 717, 46 S. Ct. 388;
Lynch v. United States, 292 U.S. 571, 78 L.
ed. 1434, 54 S. Ct. 840.

In the case of *United States v. National Exchange Bank*, 270 U.S. 527, 70 L. ed. 717, 46 S. Ct. 308, *supra*, Mr. Justice Holmes delivered the opinion of the court and observed at page 34:

“The United States does business on business terms.”

and in 1933 Mr. Justice Brandeis, speaking for the court in *Lynch v. United States*, 292 U.S. 571, 78 L. ed. 1434, 54 S. Ct. 840, *supra*, said at page 579:

“When the United States enters into contract relations its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”

It is thus clear that Congress in enacting Section 9 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §258) did not intend to alter the law as laid down by the foregoing cases and did not intend to relieve anyone of liability for violating any law of the United States by virtue of a contract with the United States or any of its agencies, but intended solely to grant relief from liability where an employer in good faith acted in conformity with or in reliance upon some administrative regulation, order, ruling, or interpretation purporting to have the force of law. The Administrator of Wage and Hour Division in the bulletin to which we have referred above adopts this interpretation.

In a case similar on its facts to the instant case,

namely *Jackson v. Northwest Airlines* (D.C. Minn. 3D) 76 F. Supp. 121, the District Court held:

“Defendant entered into a contract with the United States to modify bombers. That contract was executed for the Government by a contracting officer of the Army Air Corps. Thus, in that transaction, the Army Air Corps was not acting as an administrative agency. It was acting as part of the executive branch of the Government and in an executive, not in an administrative agency capacity. The signature of the Air Corps contracting officers created an obligation of the United States. It acted as a contracting party, not an administrative agency.” (p. 129)

D. No document or instruction subsequent in time to the Prime Contract affected the policies of the appellees with respect to the payment of overtime to the appellants.

A vast mass of documentary evidence was introduced at the trial of these cases for the purpose of showing that the appellees complied scrupulously with every instruction and request of the War Department in the performance of their contracts. Some of these exhibits comprise organization charts, overtime payments to manual employees (both of these appellants were non-manual employees), activities of the appellees at La Porte, Indiana (all operations material to these cases took place in the Aleutian Islands), methods of preparing payrolls and base salary schedules, computation of travel time and holiday pay. No document or oral instruction ever caused the appellees to deviate one iota from the terms of the prime contract

(Exhibit 13) in their policies concerning overtime payment. Their failure to make overtime payments in accordance with the Fair Labor Standards Act is the only act or omission complained of in these cases. That none of these documents had any effect upon the conduct of the appellees with reference to the act or omission complained of is fully borne out by the testimony (R. 273-275, 366, 421-422).

E. The War Department never purported to interpret the Fair Labor Standards Act.

In Exhibit 21 quoted above the War Department specifically advised the appellees that the Fair Labor Standards Act was administered by the Wage and Hour Division of the Department of Labor and further advised the appellees that all problems concerning the applicability of the Fair Labor Standards Act to a contractor's operations should be submitted to the War Department which would in turn obtain a ruling from the appropriate civilian agency. The procurement regulation set forth in Exhibit 81 specifically advised all CPFF contractors that the applicability of the Fair Labor Standards Act to their operations was a matter of dispute between the War Department and the agency charged with the enforcement of the Fair Labor Standards Act, namely the Wage and Hour Division. In Exhibit 75 the War Department made a further disclaimer of any knowledge as to whether or not the Fair Labor Standards Act applied to the appellees' operations. Moreover, the Contracting Officer in charge of these contracts

specifically disclaimed any authority in himself or in the War Department to pass upon the question of whether or not the Fair Labor Standards Act covered or applied to the projects undertaken by these appellees (R. 452).

The type of situation to which §9 of the Portal-to-Portal Pay Act of 1947 was intended to apply is well illustrated by the case of *Rogers Cartage Co. v. Reynolds* (C.C.A.-6, 1948) 166 F.(2d) 317. In that case, in affording relief to an employer under §§ 9 and 11, the Circuit Court said:

“* * * It was pleaded and proved here that the appellant relied on the fact that it was subject to the jurisdiction of the Interstate Commerce Commission and that its omission to comply with §207 of the Fair Labor Standards Act was in reliance upon the regulations, orders and rulings of the Interstate Commerce Commission. It also appears that the payments of wages were made in the amounts required by a directive of the National War Labor Board, and the appellant relied upon this fact. Both the Interstate Commerce Commission and the National War Labor Board are agencies of the United States.”
(p. 320)

The Interstate Commerce Commission and the War Labor Board are good examples of agencies of the United States issuing regulations, orders, rulings and interpretations having the force of law as opposed to an agency merely requiring performance of its contract with a private contractor and disclaiming all responsibility for the interpretation of law.

III.**WITH REFERENCE TO THE ACT OR OMISSION
COMPLAINED OF THE APPELLEES DID NOT
ACT IN GOOD FAITH.**

By the vast mass of documentary evidence concerning matters other than the payment of overtime the appellees attempted to show a course of conduct embodying action in conformity with and reliance upon all War Department requirements in good faith. Proof concerning any act or omission except the acts or omissions complained of is immaterial and irrelevant to the only issue permissible under §9 for the following reasons:

1. The appellants complain of an act or omission which has been held a violation of a specific statute. The other acts and omissions concerning which appellees have offered proof may have been in perfect conformity with then existing law. Thus the question of good faith in acting in conformity with and in reliance upon legal requirements and requests can have no logical bearing on the question of good faith in relying upon or acting in conformity with illegal requirements. The question of good faith simply is not present with respect to the legal and proper acts of the appellees. It can only arise with reference to acts found to be illegal. The appellees have asked the court to find that because they relied upon legal requirements under their contract they acted in good faith in relying upon requirements found to be illegal. Clearly no such inference can legitimately be drawn and evidence of the conduct of appellees with respect to legal demands is not probative on the issue of good

faith with respect to illegal demands of a contracting party.

Good faith cannot be involved at all in reliance upon a legal demand or requirement, but is involved solely where the reliance is upon illegal requirements.

That the good faith of an employer must be with reference to the act or omission complained of is well illustrated by the case of *Kerew v. Emerson Radio & Phonograph Corp.* (D.C.S.D. N.W. June 16, 1947) 13 Labor Cases Para. 63,908. In that case the District Court for the Southern District of New York said:

“* * * As I stated during the argument of counsel, the proof in respect to that special defense was rather thin. No conference was had with the Administrator of the Wage and Hour Division until some time in March or April of 1944, and that conference apparently was the result of certain complaints that had been made by employees that they were not being paid as they should have been paid under the Fair Labor Standards Act. *The plaintiff and the plaintiff's job were not discussed at that conference.* So this second special defense of the defendants, based upon the good faith excuse, is dismissed.”
(p. 71,469) (Emphasis supplied)

2. It is of interest to note that the only report ever submitted by the appellees to the War Department or any other agency concerning the activities of these appellants is embraced in the job descriptions attached to Exhibit 42, the submission made for compliance with the Wage Stabilization Act (R. 260-261, 424). This report was made prior to the employment of either of these appellants (R. 266). The inadequacy

of these descriptions to determine compliance or conformity with, or applicability of, any federal statute is immediately apparent from a reading of the job descriptions covering these appellants, time keepers and payroll clerks, with the evidence of their actual activities as shown in the record in cases Nos. 11464 and 11465. The reason for this utter inadequacy is apparent from the fact that *these job descriptions were not submitted at all for the purpose of determining the applicability of the Fair Labor Standards Act* or any other act to the operations of these appellees, but solely for the purpose of compliance with the Wage Stabilization Act and to secure approval of the War Department for the employment of the particular men (R. 262-263).

That any approval of the War Department of the failure of the appellees to pay overtime to the appellants based on such sketchy information affords the appellees no relief under §9 of the Portal-to-Portal Pay Act of 1947 is demonstrated by the case of *Reid v. Day & Zimmerman* (D.C. S.D. Iowa, Ottumwa Division) 73 F. Supp. 892, where the court said at page 895:

“Notwithstanding that the officers of the Ordnance Department may have approved the classification of this plaintiff as a storekeeper and exempt as such, still there is nothing to indicate that the officers of the Ordnance Department at any time knew the facts, as now stipulated, with reference to his work and also that his suggestions or recommendations as to hiring and firing were not given particular weight by the defend-

ant during the period here under examination, and approved such actions or omissions.

"I am satisfied the evidence does not establish that defendant is relieved of liability by virtue of the provisions of Section 9 of the Portal-to-Portal Act." (p. 895)

3. In the interpretative bulletin issued by the Administrator of the Wages and Hours Division quoted above, 12 F.R. 7655, at §790.15, the Administrator defines good faith as follows:

"* * * 'Good faith' requires that the employer have honesty of intention *and no knowledge of circumstances which ought to put him upon inquiry.*" (Emphasis supplied)

Since few cases have been decided to date in which the meaning of the term "good faith" has been discussed, it seems proper to refer to the Congressional debates for guidance on the meaning of this term.

Mr. Walter, a member of the House, stated in answer to a question from the floor:

"I think I should add to what I said about the defense of good faith. The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by governmental agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him. * * *" (Congressional Record May 1, 1947, p. 4515)

Mr. MacKinnon, speaking on the same day stated:

"Mr. Speaker, as a member of the Labor Com-

mittee I have been interested in the good faith section of this portal-to-portal bill. In several cases which were discussed on the floor of the House it appears that there were conflicting rulings as to employers' obligations.

"Is an employer in good faith when knowing of two conflicting rulings he claims to have relied on one of them? The answer must be that having notice of conflict, he cannot be said to have relied in good faith when he picks one of the rulings on which to rely and, particularly, it seems to me, under the language of the bill, when he relies on the ruling that is most favorable to his, the employer's interest.

"Can an employer avail himself of the good-faith defense when knowing of two conflicting rulings, he has secured indemnification against the probability that the courts will hold invalid the ruling in accordance with which he is acting?

"Under these circumstances, reliance in good faith does not exist, and the good-faith defense is not intended to be made available in such situation.

"When there are conflicting rules and interpretations by different Government officials, that is exactly the type of case which must be settled in the courts, and Congress should not and does not intend under this bill to attempt to interfere with final court decision on such questions." (Congressional Record, May 1, 1947, p. 4516)

Mr. Keating, commenting upon the same point, stated:

"* * * As a member of the subcommittee which drafted the original bill, I do not believe that such defense is intended to apply where an em-

ployer had notice of conflicting rulings, but only where he innocently in good faith followed and relied upon a ruling believing it to be valid.

“These cases were discussed when the bill was up for consideration on the floor in February where an employer working for the Government on cost-plus war contracts secured indemnification from the Government against the possibility that a ruling would be declared invalid by the courts. In such cases, under the language of the bill, I am sure there could be no good-faith defense. * * *.” (Congressional Record, May 1, 1947, p. 4517)

As has been shown above, the appellees at all times had both actual and constructive knowledge of the fact that the applicability of the Fair Labor Standards Act to their projects was a matter of dispute between their contracting party, the War Department, and the agency charged with the enforcement of the Fair Labor Standards Act, the Wage and Hour Division of the Department of Labor. The appellees never made any effort to resolve this problem.

IV.

THE DEFENDANTS WERE SOLELY CONCERNED WITH REIMBURSIBILITY, NOT WITH COMPLIANCE WITH THE FAIR LABOR STANDARDS ACT.

When in the course of the appellees' operations a serious question arose with reference to the compliance of the appellees with the Wage Stabilization Act, they were diligent in securing a ruling which would assure their compliance with this Act. As has been shown

above in our statement of the case, the reason for this diligence was that without increasing their base pay to non-manual employees the appellees could not secure an adequate working force of such employees and that in order to be reimbursed for the current cost in the payment of such increases the approval of an agency charged with the enforcement of the Wage Stabilization Act was essential (Exhibit 25, R. 238-239, 240-241, 418).

On the other hand, in so far as the applicability of the Fair Labor Standards Act was concerned, the appellees had no reason to interest themselves at all. If the appellees had paid overtime as required by the Fair Labor Standards Act without first obtaining a ruling authorizing them to do so they would not have been currently reimbursed for their costs (R. 331, 477-478).

On the other hand, if the appellees completely ignored the problem of the applicability of the Fair Labor Standards Act to their employees and subsequently were found to have violated that act and judgments were entered against them for such violations they were assured of being fully reimbursed for the amounts paid either in settlement of such claims or in satisfaction of such judgments (Exhibit 81, R. 271, 475).

Thus the record affirmatively shows that the appellees had no reason to concern themselves in any way with the applicability of the Fair Labor Standards Act and that they did not do so.

V.

THE APPELLEES ARE NOT ENTITLED TO RELIEF FROM LIQUIDATED DAMAGES UNDER §11 OF THE PORTAL-TO-PORTAL PAY ACT OF 1947.

Section 11 of the Portal-to-Portal Pay Act of 1947 (Title 29 U.S.C.A. §260) reads as follows:

“§260. Liquidated damages

“In any action commenced prior to or on or after May 14, 1947, to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (d) of this title.”

As has been shown above the War Department at all times advised the appellees that there was a serious question as to whether or not the Fair Labor Standards Act applied to their projects, but it also advised them that if the appellees were subjected to claims under the Fair Labor Standards Act, which claims might be resolved in favor of the claimants, they would be reimbursed for settlements or judgments paid. The appellees stated that their belief that they were not covered by the Fair Labor Standards Act was based upon informal advice from the National Office of the Contractors Association (R. 141-142),

and an informal oral discussion with the appellees' attorney in San Francisco (R. 226-227). Reliance upon trade bulletins with reference to liability under the Fair Labor Standards Act is insufficient to establish a defense to liquidated damages under §11 of the Portal-to-Portal Pay Act of 1947. *Mauro v. Slaughter & Co.* (D.C., S.D., N.Y., Jan. 30, 1948) 14 Labor Cases, Para. 64,299. Neither is the advice of a private attorney sufficient to entitle an employer to relief under §11. *Gustafson v. Wolferman, Inc.*, 73 F. Supp. 186. In this case the court, at page 197, said:

"The court declares the law to be, that the advice and opinion of an attorney as to the applicability of the provisions of the Fair Labor Standards Act to the business of an employer, or a segment thereof, is not in and of itself sufficient to establish 'good faith' of the employer under Section 11, of the Portal-to-Portal Act of 1947.

"That defendant did not have reasonable grounds for believing that its act in omitting to pay its employees, employed in its candy manufacturing department, minimum wage and overtime compensation was not within Sections 6 and 7, of the Fair Labor Standards Act by any interpretation issued by the Administrator of the Wage and Hour Division of the United States Department of Labor, as expressed in Interpretative Bulletin No. 6.

"Defendant could not accept the advice of an attorney and follow a course of conduct according to its own judgment of the applicability of the provisions of the Fair Labor Standards Act to its business. Defendant is presumed to know the law and whether the provisions of the Fair

Labor Standards Act applied to its business and each segment thereof. The advice of an attorney, that the provisions of the Fair Labor Standards Act do not apply to an employer's business is not 'reasonable grounds for believing that his act or omission' in not complying with the provisions of said Act was not a violation thereof. To hold otherwise would be to eliminate from actions instituted under the Fair Labor Standards Act any possible recovery of liquidated damages, as specified in Section 16 (b) thereof, 29 U.S.C.A., Sec. 216 (b)." (pp. 197, 198)

One of the most careful analyses of the scope of §11 is found in the case of *Reid v. Day & Zimmerman*, 73 F. Supp. 892, *supra*, where the court, at page 895, said:

"But as above stated, defendant claims that at least it comes within the provisions of Sec. 11 of the Portal-to-Portal Act which has to do with liquidated damages. Here again the defendant has sought to show that it is exempt from liability for liquidated damages by reason of its good faith. I am satisfied that this good faith has reference to something different than the good faith of employers in actually believing that an employee was exempt from the provisions of the Act, or came within an exempt classification. It will be noted that the Act (sec. 11) provides that two things must be shown, to wit:

"1st. 'That the act or omission giving rise to such action was in good faith.'

"2nd. 'That he (the employer) had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended.'

“It is necessary for the defendant to plead and prove both of these actions of good faith.

“The act or omission complained of was that the employee was nonexempt and was not an executive within the purview of the definition of what constitutes an executive, in that, he performed these services of the same nature as that performed by employees under him and that his recommendations for hiring and firing were not given any particular weight. Certainly, it being admitted by the stipulation of facts that the employee was not an executive, the defendant must, to establish its defense with reference to the payment of liquidated damages, plead and show that he had reasonable grounds for believing that his acts and omissions in these particulars were not a violation of the Fair Labor Standards Act. The evidence does not so establish.”

In the instant case the defendants not only never received any advice that the Fair Labor Standards Act did not apply to their operations, but on the contrary, were advised prior to their employment of these appellants that the matter was a doubtful one, and the War Department had indicated its willingness to reimburse the appellees for losses incurred through violations of the Fair Labor Standards Act.

A belief in good faith that the acts or omissions complained of were not violations of the Act was thus rendered impossible.

VI.

SECTIONS 9 AND 11 OF THE PORTAL-TO-PORTAL
ACT ARE UNCONSTITUTIONAL

In the recent cases of *Cingrigarani v. V. H. Hubbert & Son, Inc.*, 17 L.W. 3115, and *Darr v. Mutual Life Insurance Co. of New York*, 17 L.W. 3114, the Supreme Court of the United States denied *certiorari* where the Circuit Courts of Appeals had upheld the constitutionality of Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947 (Title 29, U.S.C.A. §§ 251-262). The *Darr* case, *supra*, 17 L.W. 3114, specifically raised the question of the constitutionality of the good faith defenses of Sections 9 and 11 of this Act. The appellants are fully aware that the overwhelming weight of authority in the District Courts and the Circuit Courts of Appeals is that these sections of the Portal-to-Portal Pay Act are constitutional, but, inasmuch as the appellants believe their argument that these sections are unconstitutional to be completely sound, they urge this court to consider their position.

The denial of a Writ of *Ceriorari* by the United States Supreme Court imports no expression of opinion of that court upon the merits of the question. *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 75 L. ed. 1142, 51 S. Ct. 498.

The appellant believes that Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947 violate the Fifth Amendment of the Constitution of the United States which reads as follows:

“No person shall * * * be deprived of life, liberty, or property without due process of law;
* * *.”

The right to overtime compensation under the Fair Labor Standards Act, as well as to liquidated damages, is a vested property right which accrues on the date payment should have been made. *Atlantic Co. v. Broughton*, 146 F.(2d) 480.

The cause of action created by a violation of the Fair Labor Standards Act is a quasi-contractual chose in action, and once having vested, cannot be abrogated by retroactive legislation. *Steamship Co. v. Joliffe*, 2 Wall. 450; *Coombs v. Getz*, 285 U.S. 434, 76 L. ed. 866, 52 S. Ct. 435. The quasi-contractual nature of the liabilities created by the Fair Labor Standards Act were recognized by this court in the case of *Lassiter v. Guy F. Atkinson Co.*, 162 F.(2d) 774. Where a claim for compensation has been created by statute the legislative body which created the claim cannot abrogate or destroy such claim by the subsequent repeal or modification of the statute out of which the claim arose. Sutherland, *Statutory Construction* (3d ed.) §2044; *Louisville Bank v. Radford*, 295 U.S. 555, 79 L. ed. 1593, 55 S. Ct. 854, 97 A.L.R. 1106.

CONCLUSION

Even if this court deems Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947 to be constitutional, the record is clear that the appellees have not, by the evidenced adduced in the trial of this case, brought themselves within the scope of either of those provisions. On the contrary, the record shows affirmatively that the appellees at all times acted solely in accordance with the terms of their prime contract, Exhibit 13, with the War Department; that the War Depart-

ment in connection with the projects on which these appellees were engaged functioned, not as an administrative agency of the United States, but solely as a contracting party. Moreover, the record is replete with testimony to the effect that the appellees at all times had constructive and actual knowledge that the applicability of the Fair Labor Standards Act to these projects and particularly to these appellants was a matter of serious doubt, and that the administrative agency charged with the enforcement of the Fair Labor Standards Act was of the opinion that the act was applicable to the activities of these appellants. Far from acting in good faith, the record shows affirmatively that the appellees acted solely in such a manner as to assure themselves of weekly reimbursement from the War Department in accordance with their prime contract and were at all times confident that they would be reimbursed for any amounts they might have to pay in settlement of claims or satisfaction of judgments against them for violation of the Fair Labor Standards Act.

For these reasons, the appellees have completely failed to bring themselves within the protection of Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947, and the trial court erred in entering judgment on behalf of the appellees.

The judgment of the trial court should be reversed.

Respectfully submitted,

MCMICKEN, RUPP & SCHWEPPE,
MARY ELLEN KRUG,
Attorneys for Appellants.

APPENDIX A

The pertinent provisions of Circular Letter 2236 are as follows:

"1. The following requirements as to the hours of work, overtime allowances, and provisions for leave accrual for all non-manual employees of cost-plus-a-fixed-fee principal and subcontractors in connection with construction projects will be included *in all future negotiations for such contracts* * * *

2. Attention is invited to the fact that subparagraphs *a* to *l*, inclusive, of paragraph 5, below, have been prescribed as contract provisions by Headquarters, Services of Supply, as indicated in Procurement Regulations, and no material deviation therefrom can be made without the approval of that Headquarters. * * *

4. The policies set forth in subparagraphs *a* to *r*, inclusive, of paragraph 5, below, shall be applicable to all cost-plus-a-fixed-fee principal and subcontracts hereafter placed in connection with construction activities.

5. Requirements as to hours of work, overtime and leave allowance for non-manual employees of cost-plus-a-fixed-fee principal and subcontractors:

* * * * *

b. For this purpose, non-manual employees will be classified in the following groups:

* * * * *

(2) Group "B". Employees whose base salaries are between \$50.00 and \$90.00 per week, inclusive, except those included in Groups "D" and "E."

* * * * *

- c. The base salaries of *all* employees of Groups "A," "B" and "C" will be established on the basis of a minimum work week of 48 hours.

* * * * *

- e. Group "B" employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. They will be paid at the rate of two times straight time (the weekly salary divided by 48) for all work which they are required to perform on the seventh consecutive day." (Emphasis supplied)

APPENDIX B**(Exhibit 21)**

Letter dated June 28, 1943, from War Department per Major Templeton to Guy F. Atkinson Co.

“Gentlemen:

“The following instructions have been received from the office of the Adjutant General, Washington, D. C., by Memorandum No. S5-101-43, dated 4 June 1943, and are quoted for your information and future guidance: ‘1.a. Problems frequently arise under cost-plus-fixed-fee contracts as to the applicability or interpretation of laws or Executive Orders affecting the labor costs of the contractor.

‘b. Such problems have in the main been submitted for determination through the Contracting Officer in the case of private plants operating under cost-plus contracts or through the Commanding Officer of Government-owned, privately-operated plants. However, some contractors have submitted such problems direct to civilian agencies without clearance through the War Department.

‘c. Since the War Department is responsible for the reimbursement of proper labor costs under these contracts, all such problems will be submitted through the Contracting or Commanding Officer. Such procedure should govern problems under Executive Orders Nos. 9240, 9250, and 9301; Fair Labor Standards Act; Walsh-Healey Act; Davis-Bacon Act; Copeland Act; 8-Hour Law; and other laws or orders, past or future, affecting labor costs.

‘2.a. If a ruling is required from a civilian

agency it will be obtained by or through the War Department.

'b. Applications for approval of wage or salary adjustments or other rulings under Executive Order No. 9250 by contractors not included within the delegation of authority from the War Labor Board to the War Department Wage Administration Agency will be submitted to the War Labor Board or to the Bureau of Internal Revenue through the Contracting Officer. The same procedure will be followed with respect to application to the War Man Power Commission for interpretations under Executive Order No. 9301. [286]

'c. With respect to all other laws and orders, necessary rulings of civilian agencies will be obtained by the War Department. Requests for such rulings are to be made through the Contracting or Commanding Officer.

'3. This procedure is intended to expedite determinations when the War Department has issued governing rulings. In addition, since the War Department must pass upon the labor costs for reimbursement, unnecessary duplication of clearance is avoided'."

11983 - 11984 - 11985 - 12017 - 12018

UNITED STATES
Court of Appeals
FOR THE NINTH CIRCUIT

VERNON O. TYLER,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY, a
corporation, and MORRISON-KNUDSEN COM-
PANY, INC., a corporation,

Appellees.

No. 11983

WILLIAM LESLIE KOHL,

Appellant,

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No. 12018

BRIEF OF APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, Judge

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FOR THE NINTH CIRCUIT

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JURISDICTION

Appellees concur that this Court has jurisdiction to consider these appeals under Title 28 U.S.C.A. §§ 1337 and 1291 (formerly Title 28 U.S.C.A. §§ 41(8) and 225a) and that the only statute, the validity of which is involved in these appeals is the Portal-to-Portal Act of 1947 (Title 29 U.S.C.A. §§ 251-262) and in particular §§ 9 and 11 thereof (Title 29 U.S.C.A. §§ 258 and 260).

STATUS OF THESE CAUSES
and
QUESTIONS ON APPEAL

After argument but before decision by this Court in Cause Nos. 11463, 11464 and 11465 (here Cause Nos. 11983, 11984 and 11985 respectively) and following decision but before entry of judgment of this Court in Cause No. 11312 (here Cause No. 12017) these causes were remanded to the District Court and there consolidated for hearing with Cause No. 12018 upon those matters arising under the Portal-to-Portal Act of 1947 (R. 40).

Appellees do not concur in Appellants' statement of the "Questions on Appeal" (Appellants' Brief, No. 11983, p. 30) and submit that in these five causes which have been here consolidated for purposes of hearing and argument there are but two questions before this Court:

1. Are §§ 9 and 11 of the Portal-to-Portal Act of 1947 constitutional?

2. Are the Appellees, under the provisions of §§ 9 and 11 of the Portal-to-Portal Act of 1947, relieved of any liability to Appellants or Appellants' assignors for or on account of Appellees' failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as amended (Title 29 U.S.C.A. §§ 201-219)?

Both questions were answered by the trial court in the affirmative.

STATEMENT OF THE CASE

Since the "good faith" of Appellees is of vital importance and has been placed in issue upon these appeals, it is imperative the Appellate Court have the benefit of the same factual background as did the trial court.

It must be kept in mind at all times that during the years involved in these appeals the United States, in company with her allies, was engaged in the prosecution and defense of wars upon many fronts (R. 304). The Appellees, as contractors, had been engaged by the United States, through the War Department, to construct urgently needed military bases in the Aleutian Islands of Alaska upon the Islands of Adak, Shemya, Attu and Amchitka (R. 80) for the use of the military forces in the defense of the territorial possessions of the United States and the prosecution of the war with Japan (R. 306, 375). During the early stages of the work in 1942 and 1943 the military situation was desperate, and Appellees were under compulsion to proceed with work under their contracts as rapidly as possible. New laws and regulations were being enacted and promulgated with great frequency, in order to gear industry and labor to wartime necessities. It is in the light of this background that the acts of Appellees must be considered, as was done by the trial court.

As has been referred to in the briefs of Appellants, the case was tried below under a stipulation that:

“(a) All evidence, documentary or oral, relating to any one of the defendants shall be deemed to relate to all of the defendants and all documents or communications sent to or received by one defendant shall be deemed to have been sent to, received by or come to the attention and within the knowledge of all other defendants. All information, knowledge, beliefs and actions of any of the defendants shall also be deemed to be the information, knowledge, beliefs and actions of all other defendants.” (R. 41.)

Accordingly, the record must be so read and considered.

Commencing in August, 1942, the Appellee, Guy F. Atkinson Company, began the performance of construction

work in Alaska at Excursion Inlet under its Contract No. 7100 with the United States War Department (R. 80). In the performance of this contract no overtime was paid for work up to 44 hours in a work-week in Seattle or up to 48 hours in a work-week in Alaska (R. 113). By the Wage Stabilization Act and Executive Order 9250 the wages and salaries of employees were frozen as of October 3, 1942 (R. 116).

Under date of September 30, 1943, the Appellee, Guy F. Atkinson Company, entered into a new contract, No. 202 (Ex. 13), with the United States War Department, calling for work in the construction of military bases in the Aleutian Islands of Alaska at Adak, Shemya, Attu and Amchitka (R. 80). During the negotiation of this contract the Appellee was advised that it would be required and expected to follow the provisions of Circular Letter No. 2236 (Ex. 14, see App. B., p. 56, *infra*) relative to its Alaska employees, and Circular Letter No. 2390 (Ex. 15, see App. B., p. 60, *infra*) relative to its Seattle office employees (R. 83-91, 111-12), both of which were issued by the Order of the Chief of Engineers, and its attention was further called to the provisions of the manual and non-manual employment contracts attached to Contract No. 202, as Exhibits "D" and "E" (R. 81). *Each of these documents provided for overtime policies not in conformity with the provisions of the Fair Labor Standards Act, and it is conceded by Appellants that Appellees' actual overtime policies, of which Appellants complain, were in accordance with such documents.* Circular Letter No. 2236 provided with respect to overtime:

"e. Group 'B' Employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. They will be paid at the rate of two times straight time (the weekly salary divided by 48) for all work which they

are required to perform on the seventh consecutive day.

"f. Group 'C' Employees will be considered supervisory or executive employees, and will be expected to work any necessary number of hours (including work on Sundays) without payment of additional compensation." (Ex. 14.)

Similar provisions are to be found in Circular Letter No. 2390 (Ex. 15) and Exhibit "E" to Contract No. 202 (Ex. 13).

Because Contract No. 202 contemplated and called for a work-week of seven ten-hour days (Ex. 13, R. 114), as contrasted with the 48 hour work-week under its previous contract No. 7100 and by reason of the provisions of the Wage Stabilization Act and Executive Order No. 9250, a serious personnel problem was created (R. 115, 380-1).

Under date of June 28, 1943, Appellee, Guy F. Atkinson Company, had been advised by Exhibit 21 from Major C. C. Templeton, Corps of Engineers, Chief, Personnel Branch, as follows:

"Gentlemen:

"The following instructions have been received from the office of the Adjutant General, Washington, D. C., by Memorandum No. S5-101-43, dated 4 June 1943, and are quoted for your information and future guidance: '1.a. Problems frequently arise under cost-plus-fixed-fee contracts as to the applicability or interpretation of laws or Executive Orders affecting the labor costs of the contractor.

" 'b. Such problems have in the main been submitted for determination through the Contracting Officer in the case of private plants operating under cost-plus contracts or through the Commanding Officer of Government-owned, privately-operated plants. However, some contractors have submitted such problems direct to civilian agencies without clearance through the War Department.

“ ‘c. Since the War Department is responsible for the reimbursement of proper labor costs under these contracts, all such problems will be submitted through the Contracting or Commanding Officer. Such procedure should govern problems under Executive Orders Nos. 9240, 9250, and 9301; Fair Labor Standards Act; Walsh-Healey Act; Davis-Bacon Act; Copeland Act; 8-Hour Law; and other laws or orders, past or future, affecting labor costs.

“ ‘2.a. If a ruling is required from a civilian agency it will be obtained by or through the War Department.

“ ‘b. Applications for approval of wage or salary adjustments or other rulings under Executive Order No. 9250 by contractors not included within the delegation of authority from the War Labor Board to the War Department Wage Administration Agency will be submitted to the War Labor Board or to the Bureau of Internal Revenue through the Contracting Officer. The same procedure will be followed with respect to application to the War Man Power Commission for interpretations under Executive Order No. 9301.

“ ‘c. With respect to all other laws and orders, necessary rulings of civilian agencies will be obtained by the War Department. Requests for such rulings are to be made through the Contracting or Commanding Officer.

“ ‘3. This procedure is intended to expedite determinations when the War Department has issued governing rulings. In addition, since the War Department must pass upon the labor costs for reimbursement, unnecessary duplication of clearance is avoided.’ ” (R. 281-3.)

Having in mind this directive and in an attempt to comply with the provisions of its contract and proceed with the urgently needed work, Appellee prepared organization charts and wage schedules *which included regulations relating to overtime pay* and submitted them to the Contracting Officer for approval under date of October 20, 1943 (Ex. 22, Ex. 26, See App. B. pp. 74 and 77, *infra*).

By letter dated November 5, 1943 (Ex. 25, R. 128, see App. B. p. 76, *infra*) and by letter dated November 30, 1943 (Ex. 27, R. 128, see App. B. p. 78, *infra*) Appellee's organizational charts and schedules and pay policies were approved by the contracting officer and Appellee was instructed to submit applications for further adjustments to the War Labor Board and the Salary Stabilization Unit of the Treasury Department for their approval.

Commencing about December 1, 1943, the War Department entered into negotiations with the other Appellees for additional construction work in the Alaska area (R. 464) which ultimately resulted in Contracts No. 500, 501, 502 dated December 31, 1943, Contract No. 1360 dated February 16, 1945, and Contract No. 1499 dated June 25, 1945 (R. 462-3). Under the circumstances, and in view of Exhibits 25 and 27, the Contracting Officer instructed Appellee, Guy F. Atkinson Company, to make submission to the Salary Stabilization Unit and War Labor Board of a uniform salary structure for all Alaskan contractors (R. 131). The Appellee was further instructed to retain private counsel to assist in the presentation (R. 134). Accordingly, Appellee, Guy F. Atkinson Company, with the advice and assistance of the other Appellees and Alaskan contractors, prepared a submission to the Salary Stabilization Unit and the War Labor Board.

Upon presentation of the problem to the War Labor Board it was uncertain as to its jurisdiction (R. 137, 384). The matter was thereupon presented to the Salary Stabilization Unit of the Treasury Department (R. 137, 384-5). It advised, after considerable delay and near the end of February, 1944, that it would not accept a joint submission and that it would be necessary for each contractor to submit a separate application at the place of its home, or main office (R. 384-5).

Since the Contract No. 202 had been signed in September of 1943 and more than five months had passed without being able to secure a decision upon the wage scales to be employed in urgent military work, a conference of high military and civilian officials was called for Seattle (R. 385-8). At this meeting Major Bedell of the Civilian Personnel Division of the Army Service Forces and Mr. Curtis of the Labor Branch of the Office of the Chief of Engineers in Washington, D. C., advised that if the application be made to the Secretary of War's office, it would assume jurisdiction to determine the problem through the War Department Wage Administration Agency (R. 387-8). Accordingly, Appellee, Guy F. Atkinson Company, was instructed to withdraw the applications to the War Labor Board and Salary Stabilization Unit and submit all material to the Contracting Officer (R. 139). This was done on March 3, 1944 (Ex. 36).

In the meantime, and in an effort to secure an answer to some of the perplexing problems with which it and the other Appellees were faced, Guy F. Atkinson Company, through its Vice-President, Northcutt, wrote the Contracting Officer at the Seattle office of the District Engineer on December 23, 1943, inquiring:

"2. Is there any reason why premium rates should have been paid for work in excess of forty hours per week under Contract No. W-869-eng-7100?

"3. Is the payment of premium rates for work in excess of forty hours per week mandatory under Contract No. W-45-108-eng-202?" (Ex. 74.)

To this direct inquiry the Contracting Officer replied on April 13, 1944, as follows:

"In answer to the second question, there is no reason why premium rates should have been paid for work in excess of 40 hours per week unless the work came under the jurisdiction of the Fair Labor Standard Act. Many

highly trained legal minds have pondered this question without arriving at a satisfactory conclusion. Obviously, the Chief of Engineers did not believe the Fair Labor Standards Act applied because the initial policy was that only straight time overtime be allowed for work in excess of 48 hours per week and then only to the lower grade employees. Grade B employees were allowed no overtime at all during the first six days of the week.

“Circular Letter No. 2390 is the result of this continuous argument about the application of the Fair Labor Standards Act. The wage and hour people claimed that it did apply and no authoritative answer could be obtained, *so the legal staff of the Chief of Engineers effected a compromise acceptable to the wage and hour people. This provided pay for the lower bracket employees in conformity with the provisions of the Act, but did not accept the application of the Act over all, as demonstrated by the straight-time overtime provisions of Grade B employees.* The only explanation of this is that it was a compromise agreement that such employees were semi-supervisory. The Act exempts supervisory employees, but nothing is said about semi-supervisory employees, so the debate is still unsettled. *The compromise did obtain the assurance that the wage and hour people would not press claims under the Act because of failure to pay time and a half overtime for the B Group.*

“*Your third question is answered by the above, except that the mandatory part is derived from the directive of the Chief of Engineers that contracts negotiated after May, 1943, shall use the compromise agreement.*” (Italics supplied.) (Ex. 75.)

This definite assurance had been preceded by letters from the Contracting Officer of February 12, 1944 (Ex. 33, see App. B. p. 79, *infra*) and February 13, 1944 (Ex. 34, see App. B. p. 80, *infra*) dealing with Seattle office overtime and Alaska employees overtime, in which the following instructions were given:

“Overtime pay shall be in accordance with the Chief of Engineer’s Circular Letter 2390, a copy of which has already been furnished to you.” (Ex. 33.)

and

“It will be necessary for your non-manual employees to work any reasonable number of hours per day during the first six days of a week to fulfill their functions. However, no overtime benefits shall accrue on the first six days.” (Ex. 34.)

Furthermore, Appellee, Guy F. Atkinson Company, through Mr. E. B. Skeels, its Job Manager, under date of March 18, 1944, had addressed an inquiry to the Resident Engineer in Alaska as follows:

“Under the labor provisions of our contract, Article 8, paragraph b., Group ‘B’ employees are expected to work any reasonable number of hours during the first six days of the work week at straight time. We believe the interpretation of ‘reasonable number’ to be eight hours.

In the interest of economy and general efficiency on the job, it is our opinion that numbers of non-manual employees in Group ‘B’ be required to work ten hours per day to conform to the hours of work of manual employees over whom the non-manual employees are exercising checking supervision. For the additional two hours per day we believe the non-manual employees are entitled to overtime payments in conformity with the provisions of the job contract and Executive Order No. 9240.

Your favorable consideration is earnestly solicited.”
Ex. 39, see App. B, p. 82, *infra*)
to which a reply was received on April 12, 1944, stating:

“Receipt of your letter of 18 March 1944 requesting approval for the payment of overtime to Group B non-manual employees is acknowledged.

Payment of overtime compensation to Group B non-manual employees would be in violation of Executive Order No. 9240. For the payment of overtime, Government regulations define Group B employees as follows:

‘Group B employees will be expected to work any reasonable number of hours six (6) days per week without payment of additional compensation. They will be paid at the rate of two times straight time (the weekly salary divided by 48) for all work which they are required to perform on the seventh consecutive day.’

This stipulation under Executive Order No. 9240 was made a part of your Contract W 45-108-eng-202 and is contained in paragraph d, Article VIII thereof.

This factor was taken into consideration when the field organization schedule of nonmanual employees under Contract W 45-108-eng-202 was established and approved for your Company. Accordingly, this Headquarters cannot approve the request contained in your letter of 18 March.” (Ex. 40, see App. B. p. 83, *infra*.)

Through the Seattle office of the District Engineer, Corps of Engineers, the submission was made to the War Department, and through it to the War Department Wage Administration Agency (Ex. 42). This resulted in the so-called Abersold Directive of April 27, 1944 (Ex. 16, see App. B. pp. 63-71, *infra*). *By this directive specific approval was given to the overtime policies and practices as employed by Appellees throughout the performance of their contracts and of which Appellants complain as having been in violation of the provisions of the Fair Labor Standards Act.*

In the Abersold Directive, under a section headed as follows, appears:

“7. *Overtime Payments:*

- b. Group ‘B’ employees will be paid at the rate of straight time for all work which they are required

to perform in excess of 40 hours during the first six days worked of any regularly scheduled work week, and at the rate of two times straight time for all work which they are required to perform on the seventh day worked of such work week.

- d. Group 'C' employees will work any necessary number of hours (including work on the seventh day) without payment of additional compensation." (Ex. 16.)

This directive was followed and complied with by Appellees.

As of the date of receipt of the Abersold Directive none of Appellees was of the opinion or belief that their operations were covered by the provisions of the Fair Labor Standards Act (R. 166, 167, 188, 317, 472).

Mr. Ray H. Northcutt, Vice-President of Appellee, Guy F. Atkinson Company, who had charge of the submissions to the War Labor Board and Salary Stabilization Unit of the Treasury Department, testified:

"Q. Mr. Northcutt, in these many conferences which you had—as you testified—with the representatives of the War Labor Board, the representatives of the Salary Stabilization Unit and these joint agency meetings in which representatives of all of the various persons interested in employment in Alaska participated, including the Labor Department, were you ever advised at any time that the policies embodied in these submissions were in violation of the Fair Labor Standards Act or any other statute? A. No, sir.

The Court: What did you do, if anything, to keep from violating the Fair Labor Standards Act?

The Witness: Do you mean at this time?

The Court: At any time, this time included.

The Witness: Before we engaged in the War Department contracts we consulted with our own main office and our attorneys, and the National office of the

Contractors Association to get information generally as to what work was covered by the Fair Labor Standards Act,—what of our activities might be covered by the Fair Labor Standards Act, and were advised that new construction was not covered; that if we were engaged in repair and maintenance of existing structures or facilities, that that would probably be under the Fair Labor Standards Act.

The Court: Is your present statement related only to non-manuals or related to all—

The Witness: Related to all of our construction activities; and that was prior to our engaging in these War Department contracts in Alaska and the Aleutians.

The Court: I am just concerned about them now because I don't believe any other contracts other than those are involved in this litigation.

The Witness: That is correct, sir. In this connection we depended upon the War Department and their Labor Relations Section and their legal advisers to advise us upon the applicability of all regulations in connection with this work,—partly as our own policy and partly because that is specified in our contract.

Every feature of our employment and employment conditions was directed by the War Department representatives. We were given no latitude in that regard and the War Department, we considered, was able and obligated to inform and instruct all CPFF contractors on that problem.” (R. 141, 142.)

Further:

“The Court: The court would like to know why you feel you would have done so.

The Witness: Why, sir, the War Department represented themselves to us as the authoritative body to instruct us and direct us in all matters pertaining to labor, payment of wages, overtime and so forth, and we were given to understand by the War Department that

they had taken and would continue to take all necessary steps with the Department of Labor and that all instructions and interpretations to us would emanate from the War Department, and until we heard to the contrary from the Department of Labor we would naturally and did in 1943, '44 and '45 follow the War Department on that basis." (R. 217, 218.)

Mr. Clifford T. McBride, the Business Manager of Appellee, Birch-Morrison-Knudsen, testified to the same effect:

"A. We were given a contract by the government and a wage structure, and we didn't have any reason at all to believe that the War Department would direct us to do anything that would conflict with any other law." (R. 477, 478.)

Similarly, Mr. John I. Noble, who was Chief of the Contracts Projects Branch of the Alaska Division of the District Office, Corps of Engineers, testified:

"Your Honor, may I point out that the Office of the Chief of Engineers had its headquarters in Washington, D. C., with a very large staff—presumably the most expert that they can obtain. That is the headquarters of the Corps of Engineers. They have branches of specialists —. Well, the legal branch and the labor relations branch. They are the ones who are looked to to coordinate with the Wages and Hours Division of the Department of Labor and other branches of the Government. When the Chief of Engineers issues a directive to a District Engineer saying '2236 and 2390 shall be incorporated in your contracts henceforward,' it is our assumption—it is certainly not my place to go back of the provisions and ask, 'Are these legal?' It is the assumption that they have cleared all of that ground and have taken any necessary steps to correlate with the departments of the Government." (R. 448-9.)

In the summer of 1944, a Mr. Cecil, a representative of the Wages and Hours Division of the Department of Labor, visited the offices of Appellee, Guy F. Atkinson Company,

in Seattle (R. 225, 226). His superior, Mr. Walter T. Neubert, testified that Mr. Cecil "had no authority to issue opinions." (R. 458.) Subsequent to this visit and an examination of the records of the office, a letter dated September 19, 1944, was received at the office of Appellee, Guy F. Atkinson Company, from Walter T. Neubert, Seattle Branch Manager, Wage and Hour Division, United States Department of Labor (Ex. 73). This letter read, in part:

"Inasmuch as certain violations of the Fair Labor Standards Act have been disclosed in a recent inspection of your operations, it becomes necessary to ask you to compute overtime due certain employees."

With reference to his authority to determine the applicability of the Fair Labor Standards Act, Mr. Neubert testified:

"A. I have no authority to initiate opinions. I have to pass them on." (R. 456.)

Following the receipt of the communication, Exhibit 73, the Appellee, Guy F. Atkinson Company, in conformity with the instructions contained in Exhibit 21 heretofore quoted, referred the matter to the War Department for action (R. 231; Ex. 76). Under date of October 3, 1944, the Contracting Officer, on behalf of the War Department, acknowledged receipt of the inquiry and, in part, stated:

"You will be advised as soon as definite instructions are received." (Ex. 78.)

Subsequent to this acknowledgment nothing further was heard directly by Appellees from the War Department, or the Wages and Hours Division (R. 340, 474).

During the latter part of November, 1944, there was brought to the attention of Appellees a file of correspondence which had been initiated through a complaint by one George A. Parks, an employee of Birch-Morrison-Knudsen, to Senator Kenneth S. Wherry, that the employee had not been paid

proper overtime during his work in Alaska (Ex. 55). Senator Wherry referred this complaint to the Wages and Hours Division of the Department of Labor and received a reply direct from the Honorable L. Metcalf Walling, Administrator, reading as follows:

“U. S. DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

Washington

September 30, 1944

Office of the Administrator
Honorable Kenneth S. Wherry
United States Senate
Washington, D. C.

Dear Senator Wherry:

A reading of the communication received by you from Mr. George A. Parks, 5102 Capital Avenue, No. 8, Omaha 6, Nebraska which you forwarded me on September 26, 1944, indicates that there is no action which should appropriately be taken by these Divisions with respect to the alleged misrepresentations to your constituent as to the number of hours he would be expected to work while employed by the S. Birch & Sons Construction Co. and Morrison-Knudsen Company, Inc., in the Aleutian Island area.

The only federal labor statute which might be found applicable to the work performed by your constituent is the Fair Labor Standards Act of 1938, commonly called the Wage and Hour Law. Mr. Parks has not claimed to be within coverage of that statute which, if applicable, would have required, as you know, payment of overtime rates for all hours worked by him in excess of 40 per week. The contract of employment apparently contemplates work in excess of 40 hours per week without payment other than the base compensation and obviously, therefore, the parties to that contract did not consider the Wage and Hour Act involved.

There are, of course, many exemptions provided for in the Fair Labor Standards Act. One of these exemptions extends to persons employed in bona fide, executive, administrative or professional capacities as defined by the Administrator. It occurs to me that that exemption may have been known to be applicable by the parties to the employment contract here involved.

Although the nature of the Alaskan project is not described in Mr. Park's letter to you, I deem it advisable to point out also that it is my opinion that employees of construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, I believe that employees whose work occupies them in the original construction of buildings are not generally within the scope of the Fair Labor Standards Act even if the buildings when completed will be used to produce goods for commerce. The Act applies, you will recall, only to those employees who engage in interstate commerce, produce goods for interstate commerce, or are necessary to the production of such goods.

It is my recommendation that since no claim has been made by your constituent to entitlement of overtime compensation by reason of a federal law that you seek advice from the War Department, Office of the Chief of Engineer. Perhaps more particular advice can be furnished you there with respect to this type employment contract.

I am returning your constituent's letter and employment contract as requested by you.

Sincerely yours,

L. METCALF WALLING
Administrator" (Ex. 55)

There was certainly no suggestion in this letter that Appellees were in violation of the Fair Labor Standards Act.

In February of 1945 the question of the application of

the Fair Labor Standards Act to the employees of Appellees was again brought up by the filing of certain claims by employees. These were referred to the War Department for opinion and produced a reply from Captain D. M. Pelton, Contracting Officer, which stated, in part, as follows:

“After carefully considering the validity of the claims, it is the decision of the Contracting Officer that favorable action is precluded by existing War Department policies. The claims are accordingly denied in their entirety.” (Ex. 63; R. 314.)

Insofar as the record in this case discloses, this stated policy of the War Department has never changed and inheres in the numerous exhibits in this record enunciating the policy of the War Department on litigation procedure. (See Ex. 57, 62, 63, 64, 65 and 79.)

In addition to the documents hereinbefore referred to, the exhibits in evidence disclose the proper channels of command through which all communications were handled. (See Ex. 23, 47, 49, 50 and 56.) The record contains numerous instructions received by Appellees indicating non-payment of overtime to non-manual employees (See Ex. 28, 41, 44, 45 and 46) and demonstrates the close supervision of the War Department over the activities of the Appellees relating to personnel problems (See Ex. 51, 61 and 67) including the prescribing of the forms of non-manual employment agreements used by Appellees (See Ex. 52, 53, 54, 60 and 66). The reliance of Appellees in good faith upon the instructions of the War Department, the Corps of Engineers and the Wage Administration Agency as regards other matters is also amply demonstrated upon this record. (See Ex. 29, 30, 31, 32, 36, 37 and 38.)

For the convenience of the Court we have set forth in Appendix B the material portions of those exhibits which are not quoted extensively in this Statement of the Case or else-

where in this brief and which we believe are best illustrative of the documents and communications received by Appellees from the Corps of Engineers, the War Department and the Wage Administration Agency and upon which Appellees acted and relied.

ARGUMENT

I.

Sections 9 and 11 of the Portal-to-Portal Act Are Constitutional.

Appellants having herein attacked the constitutionality of Sections 9 and 11 of the Portal-to-Portal Act, it is deemed advisable to meet this issue at the outset of our argument. The wealth of judicial expression uniformly rejecting the contention that the Act in any aspect violates the Fifth Amendment of the Constitution, makes it a work of supererogation to analyze or even list the cases. At an earlier date the Act had been held constitutional in over one hundred decisions. (See: *Sesse v. Bethlehem Steel Co.*, 4th Cir., 168 F. 2d 58, 61.) We shall confine our discussion to a brief disposition of the authorities cited and points raised by Appellants, statement of the constitutional principles involved, and reference to the more pertinent recent decisions under the Portal-to-Portal Act.

Appellees rely upon such cases as *Steamship Company v. Joliffe*, 2 Wall 450; *Ettor v. City of Tacoma*, 228 U.S. 148; *Coombes v. Getz*, 285 U.S. 434; but these cases are not in point, because they dealt with state statutes or constitutional provisions repealing prior state laws, (See: *Battaglia v. General Motors Corp.*, 2nd Cir., 169 F. 2d 254, 261), were concerned with vested property rights based on agreements (See: *Sesse v. Bethlehem*, 4th Cir., 168 F. 2d 58, 64), and involved rights which were relied on by the parties at the time of their transactions under former law (See: *McCalpin*

v. Magnus Metal Corp. (D.C., N.D., Illinois, July 1, 1948), 15 Labor Cases ¶ 64, 633; 46 Mich. L. Rev. 723). The case of *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, is not apposite, for it involved an attempt to abridge the substantive right of a mortgagee in specific property held as security (See: *Fisch v. General Motors Corp.*, 6th Cir. 169 F. 2d 266, 271). *Worthen v. Thomas*, 292 U.S. 426, concerned a state statute held void under the contract clause of Article 1 of the Constitution, which obviously does not apply to the federal government. *New York Central R. R. v. Gray*, 239 U.S. 583, held that under an agreement which became invalid by Act of Congress, the promisee who had performed services in reliance on the subsequently invalidated promise was entitled to recover the value of his services in another form from the promisor.

None of the above cases was directed at the power of Congress to regulate interstate commerce, in the exercise of which it enacted the Portal-to-Portal Act. In fact, the only decisions cited to sustain Appellants' argument wherein a regulation of interstate commerce was attacked, expressly recognized the great latitude of the congressional power in that regard and sustained its exercise in those instances. *United States v. Carolene Products Co.*, 304 U.S. 144; *North American Co. v. S.E.C.*, 327 U.S. 686. See also: *American P. & L. Co. v. S.E.C.*, 329 U.S. 90, wherein the court states, at p. 104, "the federal commerce power is as broad as the economic needs of the nation."

Certain constitutional principles, not adverted to by Appellants and which are fully developed in the cases herein-after cited, should be briefly noted. Claims which are statutory and have not ripened into final judgment, whether or not the activities on which they are based have been performed, are completely subject to legislative action. *Western Union Tel. Co. v. Louisville & Nashville R. Co.*, 258 U.S. 13.

Even though existing laws are read into contracts and rights extended by statute may become in a sense contractual, the amendments to the statute by the same token become contractual terms—"the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435. This rule is not limited to cases where the effect of the exercise of congressional power upon pre-existing contracts is only incidental. *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240. Congress may, in the exercise of its commerce power, destroy valid pre-existing private contracts; otherwise, "individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce." *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467, 482. See also: *Fleming v. Rhodes*, 331 U.S. 100, 107.

We do not quarrel with Appellants' assertion that Congress, in the exercise of its commerce power, is limited by the due process clause of the Fifth Amendment. The point is, that the Portal-to-Portal Act does not contravene the Fifth Amendment, and the courts uniformly have so held. As is stated, for example, by the Court of Appeals for the Second Circuit in *Battaglia v. General Motors Corp.*, 169 F. 2d 254, 261, certiorari denied Dec. 6, 1948, U.S., 93 L. Ed. Ad. Op. 126:

"This is not to say, of course, that Congress may exercise its commerce power in a discriminatory or arbitrary manner. We need not go so far. Faced with what it reasonably considered a situation relating to commerce that called for legislative action, Congress, after a thorough investigation, enacted the Portal-to-Portal Act. It cannot be said that, in so doing, Congress acted arbitrarily. It is not even suggested that it acted dis-

criminatorily. Clearly the Act did not violate the Fifth Amendment in so far as it may have withdrawn from private individuals, these appellants, any rights they may (be) said to have had which rested upon private contracts they had made."

Accord: *Fisch v. General Motors Corp.*, 6th Cir., 169 F. 2d 266, 272, certiorari denied Jan. 3, 1949, U.S.

.....

Appellants present what they say is an argument of first impression when they contend that regardless of the economic factors and conditions warranting enactment of the Portal-to-Portal Act so far as purely "portal" type activities are concerned, these considerations do not support the validity of Sections 9 and 11 when applied to ordinary wage and hours cases. This argument heretofore has been judicially considered and rejected.

In an "ordinary" action to recover overtime for work admittedly performed, and not involving "portal" activities, the court stated in *Jackson v. Northwest Airlines*, (D.C. Minn.) 76 F. Supp. 121 at 132:

"Plaintiffs also argue that Congress' determination of an emergency cannot justify an invasion of plaintiffs' rights here.

"The validity of the Portal-to-Portal Act of 1947 under the Federal Constitution has been determined many times on the same grounds urged by plaintiffs here and also on similar ones. * * * The arguments of plaintiffs have been considered. Sections 9 and 11 of the Portal-to-Portal Act are valid; they do not violate the Federal Constitution."

See also *Burke v. Mesta Machine Co.* (D.C., W. D. Penn.), 79 F. Supp. 588, involving non-portal type activities, wherein the identical contention was urged that the congressional "determination of an emergency cannot justify invasion of

plaintiffs' rights here," and was similarly rejected by the court.

It will be noticed from the congressional proceedings that more than ample factual and legal justification for the enactment of Sections 9 and 11 was found to exist. Vol. 93, Congressional Record, Feb. 27, 1947, p. 1491 et seq.; March 18, 1947, p. 2193 et seq.; May 1, 1947, p. 4388 et seq.; House Report No. 71, 80th Cong., 1st Sess.; Senate Report No. 48, 80th Cong., 1st Sess.

While, as hereinbefore observed, the decisions sustaining the validity of the Portal-to-Portal Act are almost too numerous to mention, it appears appropriate to observe that the constitutionality of the Act, or sections thereof, has been considered, and in each instance upheld, in the following decisions of United States Courts of Appeals:

Rogers Cartage Co. v. Reynolds, 6th Cir., 166 F. 2d 317;

Sesse v. Bethlehem Steel Co., 4th Cir., 168 F. 2d 58;
Atallah v. Hubbert & Sons Inc., 4th Cir., 168 F. 2d 993, cert. den., sub nom. *Cingrigrani v. Hubbert & Son*, Nov. 25, 1948, U.S., 93 L. Ed. Adv. Op. 92;

Battaglia v. General Motors Corp., 2nd Cir., 169 F. 2d 254, cert. den. Dec. 6, 1948, U.S., 93 L. Ed. Adv. Op. 126;

Darr v. Mutual Life Ins. Co., 2nd Cir., 169 F. 2d 262, cert. den. Nov. 22, 1948, U.S., 93 L. Ed. Adv. Op. 94;

Fisch v. General Motors Corp., 6th Cir., 169 F. 2d 266, cert. den. Jan. 3, 1949, U.S.;

Lasater v. Hercules Powder Co., 6th Cir., F. (2d) 15 Labor Cases ¶ 64, 857, Dec. 6, 1948;

Potter et al v. Kaiser Co., Inc., 9th Cir., F. (2d) Jan. 10, 1949.

Decisions of United States District Courts wherein Sections 9 or 11 of the Act, or both, have been specifically considered, and in each case upheld, are listed in the margin.*

For the Court's convenience, those portions of the several decisions of United States Courts of Appeals dealing particularly with Sections 9 and 11 of the Portal-to-Portal Act are here quoted *in extenso*.

In *Rogers Cartage Co. v. Reynolds*, 6th Cir., 166 F. 2d 317, at pp. 320, 321, Judge Allen spoke for the court as follows:

"Sections 9 and 11 of the Portal-to-Portal Act are constitutional. Congress, in the exercise of its power to regulate interstate commerce, may interfere with valuable property rights. *North American Co. v. Securities & Exchange Commission*, 327 U.S. 686, 708, 66 S. Ct. 785, 90 L. Ed. 945; *American Power & Light Co. v. Securities & Exchange Commission*, 329 U.S. 90, 67 S. Ct. 133. While the rights given to employees under the Fair Labor Standards Act are substantial, they did not exist at common law, nor were they established by the United States Constitution. Since they are purely the creature of statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment. Cf. *Western Union Telegraph Co. v. Louisville & Nashville Rd. Co.*, 258

**Darr v. Mutual Life Insurance Co.* (D.C. S.D. N.Y.), 72 F. Supp. 752, aff'd 169 F. 2d 262, cert. den. U.S., 93 L. Ed. Adv. Op. 94; *Lasater v. Hercules Powder Co.* (D.C., E.D. Tenn.) 73 F. Supp. 264, aff'd F. 2d, 15 Labor Cases ¶ 64, 857; *Reid v. Day & Zimmerman* (D.C., S.D., Ia.) 73 F. Supp. 892, aff'd 168 F. 2d 356; *Kam Koon Wan v. E. E. Black Ltd.*, (D.C. Hawaii) 75 F. Supp. 553; *Jackson v. Northwest Airlines* (D.C. Minn.) 76 F. Supp. 121; *Blessing v. Hawaiian Dredging Co.* (D.C. Dist. of Col.) 76 F. Supp. 556; *Ferrer v. Waterman S.S. Corp.* (D.C. Puerto Rico) 76 F. Supp. 601; *Asselta v. 149 Madison Ave. Corp.* (D.C., S.D. N.Y.) 79 F. Supp. 413; *Burke v. Mesta Machine Co.* (D.C. W.D. Penn.) 79 F. Supp. 588; *Wood v. Guy F. Atkinson Co.* (D.C. W.D. Wash.), (Feb. 18, 1948), 14 Labor Cases ¶ 64, 466; *Hoffman v. Todd & Brown, Inc.* (D.C. N.D. Ind., Oct. 25, 1948), 15 Labor Cases ¶ 64, 856.

U.S. 13, 42 S. Ct. 258, 66 L. Ed. 437; *Kline v. Burke Const. Co.*, 260 U.S. 226, 234, 43 S. Ct. 79, 67 L. Ed. 226, 24 A.L.R. 1077. The constitutionality of the Act has been recently considered in various District Courts, and invariably upheld. Cf. *Boehle v. Electro Metallurgical Co.*, D. C., 72 F. Supp. 21."

In *Darr v. Mutual Life Insurance Co.*, 169 F. 2d 262, certiorari denied, Nov. 22, 1948, U.S., 93 L. Ed. Adv. Op. 94, the Court of Appeals for the Second Circuit spoke through Judge Chase, 169 F. 2d at p. 266, as follows:

"We need now make no distinction between section 9, which bars the claim, and section 11, which allows the elimination of liquidated damages in the discretion of the court, for if one is valid the other is also. Both were passed by Congress as a part of an act to regulate interstate commerce, a subject exclusively within the legislative power of the national government. The Portal-to-Portal Act followed Congressional investigation and findings of facts concerning the effect upon commerce of the Fair Labor Standards Act, as that statute had been construed by the Supreme Court, as shown in our opinion in *Battaglia et al. v. General Motors Corporation*, 169 F. 2d 254. We there discussed the constitutionality of the statute with especial reference to the then applicable section 2, and held that it was valid notwithstanding the fact that it obliterated causes of action for overtime pay, liquidated damages, and counsel fees, which had accrued under the Fair Labor Standards Act previous to the enactment of the Portal-to-Portal Act. The reasons which induced us to reach that conclusion in the General Motors case are pertinent here, for all three sections are but an exercise of the same power, differing only in method of application, and we refer to our opinion in that case without repetition. We hold, therefore, as did the Sixth Circuit in *Rogers Cartage Co. v. Reynolds*, 166 F. 2d 317, that, even if appellants' rights are considered as contractual, these two sections are a valid exercise of the constitutional power of Congress to legislate in the field of interstate commerce and that

section 9 bars recovery on this claim while section 11 was properly, though—in view of the effect of section 9—unnecessarily, applied to defeat recovery of liquidated damages.”

It may be noted that both the above-quoted cases involved overtime work actually performed and not “portal-to-portal” activities.

Section 9 of the Act has again recently been upheld in *Lasater v. Hercules Powder Co.*, 6th Cir., F. 2d, 15 Labor Cases ¶¶ 64, 857, Dec. 6, 1948, upon the authority of *Rogers Cartage Co. v. Reynolds*, *supra*, and *Darr v. Mutual Life Insurance Co.*, *supra*.

Without known exception, the Federal courts presented with the question have declared Sections 9 and 11 of the Portal-to-Portal Act to be constitutional, and Appellants have failed to sustain the burden of establishing that a contrary result should for the first time follow here.

II.

Appellees Are Relieved of Any Liability Under Section 9 of the Portal-to-Portal Act of 1947.

A. The Statute Involved.

For convenient reference §§ 9 and 11 of the Portal-to-Portal Act of 1947 are set forth in full in Appendix A, *infra*.

Analysis of § 9 reveals that these employers shall be subject to no liability for or on account of the failure to pay overtime compensation under the Fair Labor Standards Act if they plead and prove that this failure was

- (1) “in good faith in conformity with”
- (2) “and in reliance on”
- (3) “*any* administrative regulation, order, ruling, approval or interpretation, of”
- (4) “*any* agency of the United States”

The trial court in its informal memorandum opinion indicated that "the evidence overwhelmingly convinces the court" and that "the contracting employers of plaintiffs amply demonstrated on every hand" that this burden had been sustained.

B. The War Department, The Corps of Engineers and The War Department Wage Administration Agency Are "Agencies of the United States."

From the Statement of the Case set forth above it appears that those documents and communications brought to the attention of the Appellees and upon which the trial court found they relied in good faith were actions of (a) The War Department, (b) The Corps of Engineers of the War Department, and (c) The Wage Administration Agency.

We do not propose to burden this Court with a dissertation to establish that the War Department is an agency of the United States. With reference to the Corps of Engineers, this agency was created by Act of Congress (10 U.S.C.A. § 181) and was "charged with the direction of all work pertaining to construction, maintenance and repair of buildings, structures and utilities for the Army." 10 U.S.C.A. § 181 b.

The War Department Wage Administration Agency is also an "agency of the United States". Pursuant to General Order No. 14 of the National War Labor Board, dated November 26, 1942 (29 C.F.R. Cum. Supp. § 803.14; 7 F.R. 9861; for amendments not here material see 29 C.F.R. 1943 Supp. § 803.14 and 29 C.F.R. 1945 Supp. § 803.14) it was provided:

"(a) The National War Labor Board hereby delegates to the Secretary of War, to be exercised on his behalf by the Wage Administration Section within the Civilian Personnel Division, Headquarters, Services of

Supply (hereinafter referred to as the 'War Department Agency') the power to rule upon all applications for wage and salary adjustments (insofar as approval thereof has been made a function of the National War Labor Board) covering civilian employees within the continental limits of the United States and Alaska employed by * * * (3) government owned, privately operated facilities of the War Department.

"* * * .

"(h) The term 'government-owned privately-operated facilities of the War Department' shall include for the purposes of this order only those facilities (1) in which the War Department has contractual responsibility for the approval of pay roll costs * * *."

By letter dated December 24, 1942 the Commissioner of Internal Revenue delegated to the Secretary of War as agent of the Commissioner in substantially identical language the authority to rule upon such applications for salary adjustment whose approval had been made a function of the Commissioner (10 C.F.R. Cum. Supp. § 81.977 aaa).

It has been held that the War Department (*Kam Koon Wan v. E. E. Black, Ltd.*, D. C. Hawaii, 75 F. Supp. 553) and the Ordnance Department (see *Reid v. Day & Zimmerman*, D.C. S.D. Iowa, 73 F. Supp. 892, aff'd. 168 F. (2d) 356) as well as the Corps of Engineers are agencies of the United States under the Portal-to-Portal Act of 1947 (*Curtis v. McWilliams Dredging Co.*, 119 N.Y.L.J. 744, 78 N.Y.S. (2d) 317). Similarly the Bureau of Yards and Docks of the Navy has been determined to be an "agency of the United States" (*Kenney v. Wigton-Abbott Corp.*, D.C. N.J., 80 F. Supp. 489, 496; see also *Blessing v. Hawaiian Dredging Co.*, D.C. D. Col., 76 F. Supp. 556). Also the Salary Stabilization Unit of the Treasury Department (*Wells v. Radio Corporation of America*, D.C. S. D. N. Y., 77 F. Supp. 964, 967) as well as the National War Labor Board and the Maritime

Commission (*Brueschke v. Joshua Hendy Corp.*, D.C. S.D. Calif., 14 Labor Cases ¶ 64, 266) has been held to be an "agency of the United States" within § 9 of this Act.

We do not understand that Appellants deny that the War Department, the Corps of Engineers and the Wage Administration Agency are agencies of the United States within § 9 of the Portal-to-Portal Act.

C. The Documents and Communications Relied Upon by the Appellees Were Duly Authorized Acts of These Three Agencies.

The regulations, orders, rulings, approvals, or interpretations within the purview of § 9 of the Portal-to-Portal Act of 1947 obviously refer to the actions of the agency in question and cannot simply be unauthorized or irresponsible statements from individuals "connected with" the agency. See *O'Riordan v. Helmers*, 120 N.Y.L.J. 110, 15 Labor Cases ¶ 64,657. An agency of the United States speaks only through its representatives and obviously its acts must emanate from those persons "specifically delegated to do so," (*Burke v. Mesta Machine Co.*, D.C.W.D. Pa., 79 F. Supp. 588), or those for whom such authority must be implied under the circumstances. *Kam Koon Wan v. E. E. Black Ltd.*, D.C. Hawaii, 75 F. Supp. 553 at 562-563. The unauthorized or gratuitous expressions of employees of an agency are not within the contemplation of § 9. For example, expressions of inspectors of the Wage & Hour Division of the Department of Labor upon questions as to applicability of the Fair Labor Standards Act have repeatedly been held not to be the acts of an agency of the United States under § 9 since such inspectors have not been given the authority to speak for the agency on such matters. *Burke v. Mesta Machine Co.*, supra; *Bauler v. Pressed Steel Car Co.*, D.C.

N.D. Ill., 15 Labor Cases ¶ 64,751; *Central Missouri Telephone Co. v. Conwell* 8th Cir., 170 F.(2d) 641.

No such problem of unauthorized pronouncements, however, arises in the cases now before this Court. Each and all of the documents and communications received by the Appellees emanated from one of the three agencies here involved—the War Department, the Corps of Engineers, and the Wage Administration Agency—as *its* action.

From the start to the finish of the construction projects upon which Appellees were engaged, these three agencies adopted and adhered to a uniform and unwavering policy with respect to the payment of overtime compensation to Class B and C non-manual employees. Throughout the course of these construction projects, communications and documents were sent to Appellees directing and instructing them to follow that policy.

In each and every instance the individual giving the communication or signing the document was specifically authorized to do so. The authority of these individuals is clearly set forth in the documentary record before the court. Because each of the individuals involved was acting pursuant to specific authority, there can be no question but that each and all of the documents and communications were the acts of an “agency of the United States”.

Appellants imply that Appellees are urging that each contracting officer or other person signatory to the communications relied upon by Appellees is an “agency of the United States” (Appellants’ Brief, No. 11983, p. 43). No such contention is made. What is contended is that each of these communications was promulgated or issued by persons who not only had apparent authority to so act (compare *Kam Koon Wan v. E. E. Black, Ltd.*, D. C. Hawaii, 75 F. Supp. 553 at 562-563) but who in fact were duly delegated and

authorized so to act to the knowledge of the Appellees. Within the scope of their authority from which none departed, the acts of these individuals were either the acts of the Corps of Engineers, the War Department, or the Wage Administration Agency as the case may be.

1. The Corps of Engineers.

The basic labor policies governing the military construction undertaken by the Appellees were grounded in the labor policies established by the Corps of Engineers pursuant to its statutory authority. As set forth above the Corps of Engineers was created by Act of Congress (10 U.S.C.A. § 181) and was "charged with the direction of all work pertaining to the construction, maintenance and repair of buildings, structures and utilities for the Army". 10 U.S.C.A. § 181 b. In Army Regulations No. 100-70 dated November 5, 1942 (Ex. 12) the Authority and Responsibility of the Chief of Engineers is stated to include:

"11. Labor Relations. — As the maintenance of proper relations between management, labor and Government is essential to the efficient and expeditious conduct of construction work, the Chief of Engineers will maintain the necessary organization *to insure that proper labor relations are established and maintained, that labor laws are correctly administered and that proper wage rate structures* and an adequate labor supply are maintained on all new work under his jurisdiction."

Pursuant to such authority Circular Letters 2236 and 2390 (Exs. 14 and 15) were issued by the Chief of Engineers.

Whether or not the Corps of Engineers itself be considered to be an agency of the United States within the meaning of § 9, it is clear that its actions are by law those of the War Department. As stated in *Blessing v. Hawaiian*

Dredging Co., Ltd., D.C.D. Col., 76 F. Supp. 556, 557 with reference to the Bureau of Yards and Docks of the Navy

“It cannot be gainsaid that the Chief of the Bureau of Yards and Docks speaks for the Secretary of the Navy, when functioning in this capacity.”

Pursuant to the provisions of 10 U.S.C.A. § 181b, General Marshall as Chief of Staff, transferred by War Department Circular No. 248, dated December 4, 1941 to the Corps of Engineers all construction activities then handled by the Quartermaster Corps (Ex. 10). Under Executive Order No. 9082 (3 C.F.R. Cum. Supp. page 1103) the President authorized the Secretary of War to place into effect a reorganization of the War Department. This was done in War Department Circular No. 59 dated March 2, 1942 (Ex. 11) which set up the Corps of Engineers as one of the Units assigned to the Services of Supply (See ¶ 8(b) and 7(e) (2)). Army Regulations No. 100-70 discussed above (Ex. 12) outlining the Authority and Responsibility of the Corps of Engineers, were promulgated pursuant to these foregoing authorities. Accordingly the actions, documents and communications of the Corps of Engineers and the labor policies established thereby are also the duly authorized actions and policies of the War Department.

2. The War Department.

Appellants have not contested the authority of those various individuals acting as the War Department. However, as a convenience to the Court, an analysis of the numerous documentary exhibits relating to the authority of these individuals is set forth in Appendix C, *infra*.

It is abundantly clear that each individual signing or issuing the documents and communications received by the Appellees was specifically authorized and delegated to do so and that his actions were in fact within the scope of

his authority and the authority of the Corps of Engineers and the War Department relating to such matters.

3. The Wage Administration Agency.

As set forth above (supra, p. 27) the War Department Wage Administration Agency is an "agency of the United States". The so-called Abersold Directive (Ex. 16) was the act of this agency and recites:

"Attention is invited to the fact that the War Department Wage Administration Agency has been granted specific authority, by agreement between the National War Labor Board and the 12th Regional War Labor Board to take jurisdiction over the request of the Alaskan Department and the Northwest Service Command for approval of the schedule and policies referred to in paragraph 3 above."

D. The Documents and Communications Received by Appellees Were Administrative Regulations, Orders, Rulings, Approvals and Interpretations.

Under § 9 of the Portal-to-Portal Act these Appellees shall not be subject to any liability for failure to pay overtime compensation under the Fair Labor Standards Act if they have pleaded and proved that such failure was in good faith in conformity with and in reliance on "any administrative regulation, order, ruling, approval or interpretation" of any agency of the United States. That Congress intended these words to have a liberal interpretation is well set forth in the following language from the well-reasoned opinion in *Kam Koon Wan v. E. E. Black, Ltd.*, supra, at pp. 562-563:

"In Representative Walter's statement upon the bill addressed to this type of problem is found the following: '* * * there must have been literally thousands of instructions sent out by the Army, the Navy and the Maritime Commission and other government

officials to employers having government contracts during the war that were never issued or confirmed in the usual way, but the employer felt that the person giving those instructions was in a position to speak with authority and in those classes of cases we hope this measure will provide a defense.'

"In view of the congressional findings and declared objective of the Portal-to-Portal Act, the liberal interpretation which Congress intended to place upon the phrase 'agency of the United States' so far as § 9 is concerned and the Act's legislative history, I am satisfied that the military orders here involved come within the meaning of the statutory words 'regulation, order, ruling, approval or interpretation' and were orders of an 'agency of the United States'. I reach this conclusion being fully aware that it was not the normal function of the Army to concern itself directly with the Fair Labor Standards Act and to make orders, rulings and interpretations of it to suit itself. * * *"

And it may be noted in passing that the above quoted statement from Representative Walter immediately follows that portion of his statement which was quoted by Appellants (Appellants' Brief, Nos. 11984 and 11985, p. 39) but was conveniently omitted from their brief.

Counsel for Appellants suggest that the Administrator has narrowly interpreted these words (Appellants' Brief, Nos. 11984 and 11985, pp. 27-30). While the Administrator's opinions may be entitled to some weight, *Skidmore v. Swift & Co.*, 323 U.S. 134, it may be remembered that perhaps "this statement, being legally untenable lacks the usual respect to be accorded the Administrator's rulings, interpretations and opinions". *Jewell Ridge Coal Corp. v. Local No. 6167, U.M.W.*, 325 U.S. 161, 169.

The legislative history of § 9 demonstrates that "in brief Congress desired to make this defense available to employers who honestly had been misled by their own government

speaking through one of its authorized spokesmen to pursue a course of action which ultimately is found to be at variance with the laws.” (*Kam Koon Wan v. E. E. Black, Ltd.*, supra, at page 561.) The fact that Congress embraced in § 9 oral as well as written actions of the agency (cf. § 10, Title 29 U.S.C.A. § 259) is eloquent testimony that the form in which that action was expressed was of little concern in the consideration of the Act by Congress. The all inclusive nature of the wording of the statute “any administrative regulation, order, ruling, approval or interpretation” is proof itself of the soundness of the views expressed above in the *Kam Koon Wan* case, supra.

Likewise do we believe that the decided cases clearly demonstrate that the documents and communications here in evidence come within the statutory language of § 9 quoted above.

In *Curtis v. McWilliams Dredging Co.*, 78 N.Y.S. (2d) 317 the Court had for consideration a situation where the defendants had been involved in construction work in Greenland comparable to that of these Appellees. Although the Court considered §§ 9 and 11 of the Portal-to-Portal Act of 1947 to be unconstitutional, it found no difficulty in holding that the contractors were within § 9 in their reliance upon Circular Letters 2236 and 2390 (here Exs. 14 and 15) and other documents and communications substantially identical in character to those received by these Appellees—and even though the defendants themselves had advised the War Department that they understood that the Administrator was of the opinion that the Fair Labor Standard Act applied to their operations. The Court states regarding the defense asserted under § 9:

“The defense calls for a review of the orders, rulings and correspondence of the War Department.

"The contract between the War Department and the defendants was entered into August 27, 1941. It provided, among many other details, for reimbursement to the defendants of all payroll expenditures. Circular letter of the department (Finance No. 167) of June 20, 1941, was then in effect; it prescribed the auditing procedure on cost-plus contracts and although it dealt with salaries and payrolls it did not mention overtime. On August 9, 1941, a supplement was issued (Finance No. 167, Supplement No. 2) as follows: 'The payment of overtime to cost-plus-a-fixed-fee contractors' weekly salaried employees is not justified by normal practice and is not permissible.' On August 21, 1941, the Office of Division of Engineers, North Atlantic Division, wrote the defendants that 'no overtime will be allowed to employees paid at a weekly rate of pay' (all three plaintiffs here were paid on a weekly basis); but compensatory time will be allowed' them 'for all time worked in excess of 40 hours a week.' Later, October 24, 1941, the provision for 'compensatory time' was rescinded. Thereupon the defendants wrote for instructions in a letter prepared for them by their attorneys. They stated

"* * * we draw to your attention that in recent months the United States Department of Labor, Wage & Hour Division, under whose jurisdiction comes the administration of the Fair Labor Standards Act, * * * has issued interpretive bulletins bearing upon overtime in the contracting industry. We are advised that such interpretive bulletins very clearly state that in the opinion of the Wage and Hour Division, many of our personnel who from time to time work overtime are covered by the provisions of the Federal Wage and Hour Law. If that is so, such of our personnel so covered would be entitled to time-and-a-half for overtime.'

"The response, November 7, 1941, was as follows:

"'You are advised that no compensation will be allowed for such overtime work either in the form of

an equal amount of time off with pay or in the form of extra pay for extra hours of duty.'

"Upon the receipt of this letter a member of the firm of attorneys representing these defendants and other contractors engaged in similar work for the War Department discussed the matter with the representative of the War Department who had prepared the letter of November 7; and he was told that it was the considered opinion of the War Department that the Fair Labor Standards Act did not apply to employees of these contractors, including defendants; that it was the policy of the War Department to act upon that view and that the contractors would receive no reimbursement from the government for any overtime they might pay pursuant to the provisions of that act."

Concerning Circular Letter 2236 and 2390 the Judge observed:

"* * * Again these provisions did not follow the provisions of the Fair Labor Standards Act; in promulgating it the War Department considered Executive Order 9301 (February 19, 1943) already referred to, and also the act. It believed that Circular Letter 2390 complied with the Presidential proclamation; and that the Fair Labor Standards Act did not apply."

and concludes his well-reasoned opinion on this point as follows:

"* * *. But it does not appear that the Secretary of War at any time recognized the applicability of the statute to employees like the plaintiffs here and as late as April 7, 1943, it was 'the understanding of the War Department that non-manual employees of these contractors (cost-plus-a-fixed-fee contracts) were not entitled to receive time-and-one-half for overtime under the provisions of the Fair Labor Standards Act * * *'."

* * *

“So far as the defendants are concerned their negotiations and dealings were entirely with the War Department. Employees could be hired by them only after approval by the Corps of Engineers and the salary and wage scale was that approved by the Corps of Engineers. In no event could the defendants be reimbursed by the Government for any wages disbursed unless those payments were in strict accord with the instructions and rulings from the Department. If we examine the relations of the defendants to the War Department, we find that although there were doubts in the minds of the defendants as to the applicability of the statute, they were told that overtime would not be allowed under the Fair Labor Standards Act, and the very regulations and orders issued from time to time consistently bear out these instructions. Quite apart from the question as to whether there was any policy of the War Department with relation to cost-plus contractors, it is plain that there were orders and rulings relating to the payment of wages directed to the defendants and that the defendants complied with those rulings.”

It is also indicated in *Leeds v. Sawyer*, 118 N.Y.L.J. 261, 13 Labor Cases ¶ 63972, judgment vacated on other grounds, 118 N.Y.L.J. 445, 13 Labor Cases ¶ 64,032, that Circular Letters 2236 and 2390 are within § 9. Not only have military orders been held to be within the purview of this statute, *Kam Koon Wan v. E. E. Black, Ltd.*, supra, but also “circular letters” of instructions from the office of the Officer in Charge, Bureau of Yards and Docks of the Navy. *Kenney v. Wigton-Abbott Corp.*, D.C.N.J., 80 F. Supp. 489, 496. Likewise within § 9 have been held rulings of the National War Labor Board, Shipbuilding Commission and approvals of the Maritime Commission (*E. H. Brueschke v. Joshua Hendy Corp.*, D.C.S.D. Calif., 14 Labor Cases ¶ 64,-266), War Labor Board directives (*Rogers Cartage Co. v. Reynolds*, 6th Cir., 166 F. (2d) 317 at 320), and approvals of the Salary Stabilization Unit of the Treasury Department

(*Wells v. Radio Corporation of America*, D.C.S.D.N.Y., 77 F. Supp. 964, 967)—the character of all of which are identical with the rulings of the Wage Administration Agency here in evidence (Ex. 16).

Finally there should be called to the attention of this Court, in addition to the decision of the court below upon this record, the conclusions of the Hon. Lloyd L. Black of the same court below in *Wood et al. v. Guy F. Atkinson Co., et al.*, D.C.W.D. Wash., 14 Labor Cases ¶ 64,466 which, as to these matters arising under § 9 of the Portal-to-Portal Act of 1947, were rendered upon substantially the identical record which is before this Court, the exhibits in both cases being identical and the testimony being substantially the same by substantially the same witnesses. Judge Black stated in his informal opinion:

“I may say further, counsel, that in the light of all the evidence and of the law I am satisfied that each and every cause of action submitted to me should be dismissed under Section 9. Certainly, if Section 9 had not been passed and Section 11 had, I would be required to hold that the defendants had acted in good faith as required by the provisions of Section 11. However, I am satisfied that the defendants have established by the preponderance of the evidence the things requisite for them to establish under Section 9.”

The decided cases well illustrate that the documents and communications received and relied upon by these Appellees were “*administrative regulations, orders, rulings, approvals and interpretations*” under § 9. They effectuate, we submit, the intent of Congress as set forth by Representative Walter, sponsor of the bill in the House of Representatives and member of the Conference Committee, when reporting to the House on the Conference Committee Report accompanying the final draft of the bill as follows:

"Mr. Speaker, I do not believe any conference report—at least, there have not been many presented to this House for consideration—has received the care that was given this legislation. * * *

* * *

"* * * Of course, during the war there were a great many rulings made by people who were not connected with the Wage and Hour Division, but certainly during those trying times when a contractor was endeavoring to follow out the instructions of his Government, if he received instructions from somebody in a position of authority, then if those instructions resulted in his violating the law that man should have a defense. * * *" (Vol. 93 Congressional Record, May 1st, 1947, p. 4389).

Analysis of Contentions of Appellants

It is urged by Appellants that the documents and communications on which the trial court found the Appellees relied are not "administrative regulations, orders, rulings, approvals and interpretations of any agency of the United States" because (a) by their terms they did not relate to or purport to pass upon the applicability of the Fair Labor Standards Act (Appellants' Brief, No. 11983, p. 44; Appellants' Brief, Nos. 11984 and 11985, pp. 34-35) or (b) because the Appellees had a contract with the agency involved (Appellants' Brief, No. 11983, p. 44; Appellants' Brief, Nos. 11984 and 11985, pp. 31-33.)

(a) Reference to the Fair Labor Standards Act.

Considering these contentions in this order, we believe that the first may be adequately answered by reference to § 9 itself which refers to "*any*" administrative regulation, order, etc. We also direct the Court's attention to the fundamental difference established by Congress between § 9 and § 10, which latter section relates to reliance in the

case of acts of omissions *after* the date of the Portal-to-Portal Act. Congress significantly required that future reliance be only upon the actions of the Administrator of the Wage and Hour Division—in short, actions which relate to and purport to pass upon the applicability of the Fair Labor Standards Act. We think it apparent that Congress knew, as does this Court, that the Administrator is the only agency of the United States which customarily issues or has issued administrative regulations, orders, rulings, etc. which by their terms refer to the Fair Labor Standards Act itself. Our attention has not been called to any instance where any other agency than the Administrator has purported to issue regulations, orders, etc. which relate as such to the Fair Labor Standards Act. Indeed, the Act entrusts such function by its own terms to the Administrator.

To add to § 9 the requirement that the regulations, orders, etc. relied upon shall relate to the Fair Labor Standards Act is to add a requirement not placed there by Congress and to change the substance of § 9 to that of § 10. The entire legislative history negatives any suggestion that the documents and communications relied upon by Appellees should relate or refer to the Fair Labor Standards Act. See, for example, remarks of Representative Walter quoted at p. 40 *supra*. And rather than labor the point, we simply refer the Court to the decided cases cited above in not one of which, we desire to point out, did the administrative regulation, order, ruling, etc., relied upon by the employer relate to or purport to pass upon the applicability of the Fair Labor Standards Act. See *Kenney v. Wigton-Abbott Corp.*, *supra*; *E. H. Brueschke v. Joshua Hendy Corp.*, *supra*; *Rogers Cartage Co. v. Reynolds*, *supra*; *Wells v. Radio Corporation of America*, *supra*; see also *Blessing v. Hawaiian Dredging Co.*, *supra*, and *Kam Koon Wan v. E. E. Black, Ltd.*, *supra*.

Furthermore, even if a consideration of the Fair Labor

Standards Act by the agency involved be deemed a condition precedent to the qualification of any regulation, order, etc., under § 9 it is plainly apparent from the record here on appeal that the Fair Labor Standards Act was considered by the Corps of Engineers and the War Department—considered to be inapplicable. See, for example, Exs. 14, 15, 58, 59, 63, 75. See also *Curtis v. McWilliams Dredging Co.*, 78 N.Y.S. (2d) 317, *supra*, p 35.

(b) Contracting Agency.

As indicated above Appellants urge that Appellees should be denied relief under § 9 for the reason that the regulations, orders, rulings, etc., relied upon were issued by an agency to whom the Appellees were under contract.

Preliminarily it may be observed that the contracts of Appellees (Ex. 13) were between Appellees and the United States of America rather than an agency upon whose actions Appellees relied, and even if it be deemed that Appellees' contracts were with an agency, that agency could only be considered to be the War Department and not the Corps of Engineers or the Wage Administration Agency, which agencies as noted above, derived their authority from sources outside the War Department. Accordingly even if Appellants' proposition could be accepted as valid, §9 and the findings of the trial court still stand as a necessary bar to any recovery by the Appellants.

The entire legislative history of § 9, however, as indicated by the quotations above at pages 33 and 40 categorically demonstrates that Congress intended to relieve from liability those contractors who in good faith had relied on the regulations, orders, etc. of their contracting agency.

That the regulations, orders, rulings, etc. of a contracting agency are covered by § 9 is expressly recognized by the Administrator in his "General Statement as to the Effect

of the Portal-to-Portal Act of 1947". See Title 29 C.F.R., 1947 Supp., §§ 790.13(b) and 790.14(c). We further refer to the decided cases cited above which have specifically held that the regulations, orders, etc. of a contracting agency which have been relied upon by its contractor fall within § 9. *Kam Koon Wan v. E. E. Black, Ltd.*, supra; *Curtis v. McWilliams Dredging Co.*, supra; *Kenney v. Wigton-Abbott Corporation*, supra; *Blessing v. Hawaiian Dredging Co.*, supra; *E. H. Brueschke v. Joshua Hendy Corp.*, supra; *Leeds v. Sawyer*, supra; compare also *Reid v. Day & Zimmerman*, supra; *O'Riordan v. Helmers*, supra; and *Divins v. Hazeltine Electronics Corp.*, D.C.S.D.N.Y., 13 Labor Cases ¶ 64,213.

Appellants contend that *Jackson v. Northwest Airlines, Inc.* D.C.D. Minn., 76 F. Supp. 121 dictates a contrary conclusion. Although the opinion of the District Court in that case, which is presently on appeal to the Court of Appeals for the Eighth Circuit, has been criticized as unduly restrictive of the scope of § 9 (see Note — "Portal-to-Portal—Good Faith Provisions" 48 Columbia Law Review 443 at 447) we think an analysis of the facts before the trial court does not require the conclusion that the court construed § 9 to exclude the regulations, etc., of a contracting agency. The record before the court contained no evidence whatsoever of any policy or ruling of the Army Air Force or any evidence of the authority of the contracting officer to make such. On the other hand the facts plainly revealed that the contracting officer in question twice altered his position as to the applicability of the Fair Labor Standards Act to defendant's employees to suit the convenience of the defendant who, the court found as a matter of fact, relied upon a ruling by the Chairman of the Railway Labor Panel which by law he was not authorized to give.

We submit that the *Jackson* decision is not contrary to the overwhelming authority of the decided cases and to

the extent that the language in the opinion implied that the regulations, orders, etc. of a contracting agency are not within § 9, its implications are unsound.

As indicated by the records in these cases before the Court, the responsibilities and obligations of these Appellees in the performance of their military construction work for the government were subject to constant modification and change as a result of a continuous body of instructions from numerous duly authorized contracting officers. To suggest a rule of law which would militate against an employer because he had a contract with the United States which told him to follow such instructions in favor of an employer who merely followed the instructions because he was told to do so by the terms of those regulations or orders is, we submit, to suggest the difference between tweedle-dum and tweedle-dee. In the words of Judge Learned Hand in *Cabell v. Markham*, 2nd Cir., 148 F. (2d) 737 at 739, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." We believe this Court must agree that Congress had few situations more clearly in mind than that presented by this record in the enactment of § 9.

E. The Practices of Appellees Were in Conformity with Administrative Regulations, etc., of an Agency of the United States.

The trial judge specifically found in each of these cases that the pay practices of Appellees were in good faith *in conformity with* administrative regulations, orders, rulings, approvals and interpretations of the United States War Department, the Corps of Engineers, and the Wage Admin-

istration Agency. The evidence clearly and without dispute supports the finding that Appellees conformed their pay policies to the instructions and documents received from those three agencies (R. 183-5; 398-9; 469).

The question of conformity has not been raised by Appellants in their briefs, and in fact appears to have been conceded (Appellants' Brief, Nos. 11984, 11985, pp. 33-34). Indeed, such conformity was affirmatively pleaded in the complaints filed herein by Appellants and forms the basis for these suits against Appellees.

F. The Practices of Appellees Were in Good Faith in Reliance on Administrative Regulations, etc., of an Agency of the United States.

At the outset, Appellees point to the fact that the trial court in each of these cases specifically found that all pay practices of Appellees with respect to Appellants or Appellants' assignors were "... in good faith ... and in reliance on administrative regulations, orders, rulings, approvals and interpretations of ... The United States War Department, The Corps of Engineers of the United States War Department and The War Department Wage Administration Agency." (No. 12017, R. 11) (No. 11983, R. 16) (Nos. 11984 and 11985, R. 18) (No. 12018, R. 54, 55).

Whether or not the Appellees acted in good faith is a question of fact to be determined on the evidence. See *Beaton v. Berberich*, App. D.C., 135 F. (2d) 831. Whether or not Appellees did rely upon the communications and documents received from the three agencies here involved is likewise a question of fact. The trial judge found in favor of Appellees on both of these questions, and indicated in his memorandum opinion that the evidence "overwhelmingly" convinced him and "demonstrated amply on every hand" that his findings were correct on these questions. (Trial Court's Memorandum Opinion, p. 6).

Under the mandate of Rule 52a of the Federal Rules of Civil Procedure findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Appellants have predicated their entire argument upon the premise that since Appellees' overtime pay practices were consistent with the provisions of their contracts, they could not have relied upon anything other than the contracts. This is fallacious reasoning and contrary to the record.

Accurately stated, the record discloses that Appellees sought and relied upon the regulations, orders, rulings, approvals and interpretations of The War Department, The Corps of Engineers and The War Department Wage Administration Agency, which confirmed in every respect the contract provisions with respect to overtime.

The principal contracts involved in these appeals were executed September 30, 1943 (Contract No. 202) and December 31, 1943 (Contracts 500, 501 and 502). While Circular Letter No. 2236 (Ex. 14) and Circular Letter No. 2390 (Ex. 15) were dated prior to the execution of the contracts, the Appellees were advised at the time of and *subsequent* to the date of the contracts that they would be expected to comply with the provisions of the Circular Letters. (Ex. 33; R. 83-91, 111-112). Exhibits 29 to 67, inclusive, were all either sent or received and are dated subsequent to the effective dates of the contracts mentioned.

If it be true, as Appellants contend, that Appellees did nothing more than rely upon their contracts, with respect to overtime pay procedures, why did Appellees, among other things:

1. On December 23, 1943 write the Contracting Officer, inquiring

"Is the payment of premium rates for work in excess of forty hours per week mandatory under Contract No. W-45-108-eng-202?" (Ex. 74)

2. Address inquiries to the Contracting Officer in January of 1944 which resulted in their being informed under date of February 12, 1944:

"Overtime pay shall be in accordance with the Chief of Engineer's Circular Letter 2390, a copy of which has already been furnished to you." (Ex. 33)

and under date of February 13, 1944:

"It will be necessary for your non-manual employees to work any reasonable number of hours per day during the first six days of a week to fulfill their functions. However, no overtime benefits shall accrue on the first six days." (Ex. 34)

3. On March 18, 1944 write the Resident Engineer in Alaska, inquiring

"In the interest of economy and general efficiency on the job, it is our opinion that members of non-manual employees in Group (B) be required to work ten hours per day to conform to the hours of work of manual employees over whom the non-manual employees are exercising checking supervision. For the additional two hours per day we believe the non-manual employees are entitled to overtime payment in conformity with the provisions of the Job Contract and Executive Order No. 9240.

Your favorable consideration is earnestly solicited." (Ex. 39)

4. Join in the preparation and submission of their payroll and overtime procedures to the War Department Wage Administration Agency which resulted in the Abersold Directive (Ex. 16).

These acts are not consistent with a blind reliance upon the Contract provisions, as Appellants contend.

It is impossible to read the Transcript of Record in these cases, or even the Statement of the Case as heretofore set forth, and conclude otherwise than, as did the trial court, that Appellees' overtime pay policies "were in good faith, in conformity with and in reliance on Administrative regulations, orders, rulings, approvals and interpretations of the following agencies of the United States, to wit: The United States War Department, The Corps of Engineers of the United States War Department, and The War Department Wage Administration Agency."

Appellees concede that "no document or oral instructions ever caused (them) to deviate one iota from the terms of the prime contract", as appellants contend. (Appellants' Brief, Nos. 11984 and 11985, p. 33). This is not to say, however, that Appellees did not rely upon the many orders, rulings, approvals and interpretations, subsequent to the contract. By Exhibits 16, 33, 34, 40, 55, 75, and many others, Appellees were repeatedly told and advised that there was no legal basis or authority for the payment of overtime contrary to the provisions of the contracts. The expressions as contained in the exhibits have been quoted heretofore in this brief, and for the sake of brevity we do not again set them forth here. The record conclusively establishes, however, that Appellees relied upon these orders, rulings and interpretations in maintaining their overtime pay policies.

The general situation was expressed in a letter from Lt. Col. F. G. Erie, Corps of Engineers, Acting District Engineer, Representative of the Alaskan Department, in a letter addressed to the U. S. Engineers Office at Seattle, Washington, under date of November 15, 1944, which came to the attention of Appellees, as a part of Exhibit 55, as follows: "

“The policies governing payments to non-manual employees were determined in Washington and instructions in the matter were issued to this office by the Chief of Engineers in Circular Letter No. 2236, dated 9 January 1943, and Circular Letter No. 2390, dated 13 May 1943.”

These “policies” were conveyed to Appellees by the many exhibits in this case and formed the basis for their overtime pay practices.

The Appellants “grasping at straws” have argued that since many of the rulings, orders, interpretations, etc., relied upon by Appellees do not specifically refer to the Fair Labor Standards Act, they could not form the basis of good faith reliance. Again this argument is founded upon fallacious reasoning. The subject matter of the Fair Labor Standards Act is basic pay rates, hours of work and overtime pay. Similarly, each of the exhibits relied upon by Appellees deals with the precise subject matter. If it is to be presumed that Appellees are chargeable with knowledge of all laws, it must even more be presumed that an agency of the United States is familiar with such laws and has considered the same in formulating its actions and policies. Accordingly, it cannot be said that Appellees were not, and are not, entitled to place reliance upon an order, ruling, approval or interpretation from an agency of the United States dealing with the exact subject matter of the Fair Labor Standards Act merely because such order, ruling, approval or interpretation failed to expressly refer to the Act by name.

Appellant’s briefs imply that the pay practices of the Appellees were established by the Appellees, at the direction of the War Department, with the intention of violating the Fair Labor Standards Act or with knowledge that the pay practices constituted a violation of the Act. This contention is entirely at variance with the facts. The Appellees

and the War Department were concerned with compliance with *all* laws and regulations of the United States which were deemed applicable to these projects. (See Ex. 13, Art. V. 1, b). Procedures were provided by which the War Department undertook to insure expeditious handling of all problems relating to labor for all C.P.F.F. contractors involved in operations throughout the United States (Ex. 20 and 21, *supra*, p. 5).

Appellants cite at page 53 of their brief (No. 11983) the case of *Timberlake v. Day & Zimmerman*, D.C.S.D. Iowa, 49 F. Supp. 28, as a decision which should have informed Appellees that their particular operations were subject to the Fair Labor Standards Act. Suffice it to say that the *Timberlake* case had nothing whatsoever to do with employees engaged in original construction of bases to be used exclusively for military purposes and the facts there had no similarity to the facts in these cases now on appeal.

The simple and undisputed fact is that in 1943, and throughout the life of the projects on which Appellees were engaged, neither the War Department nor Appellees considered that the Fair Labor Standards Act was applicable to employees engaged in original construction of air bases to be used for military purposes only. (R. 141, 142). See *Curtis v. McWilliams Dredging Company*, 78 N.Y.S. (2d) 317. Not only was the applicability of the Fair Labor Standards Act to operations of this type undecided in 1943, 1944 and 1945—the problem has not been authoritatively resolved by the courts even today. The applicability of the Fair Labor Standards Act to both military construction and military manufacturing operations is still the subject of conflict and confusion among the courts. Compare *Bauler v. Pressed Steel Car Co.*, D.C.N.D. Ill., 15 Labor Cases ¶ 64751 with *Assel v. Hercules Powder Co.*, D.C.D. Kan., 15 Labor Cases ¶ 64829. Compare also *Bell v. Porter*, 6th

Cir., 159 F. (2d) 117 with *Kennedy v. Silas Mason Co.*, 5th Cir., 164 F. (2d) 1016, writ of certiorari granted and the case remanded to the district court without opinion on the merits in 334 U.S. 249. See also *Laudadio v. White Construction Co.*, 2d Cir., 163 F. (2d) 383; *Divins v. Hazeltine Electronics Corp.*, 2d Cir., 163 F. (2d) 100; *St. Johns River Shipbuilding Co. v. Adams*, 5th Cir., 164 F. (2d) 1012; *Ritch v. Puget Sound Bridge & Dredging Co.*, 9th Cir., 156 F. (2d) 334.

The latest pronouncement of the Supreme Court of the United States held that employees engaged in construction work on a military base are not covered by the Fair Labor Standards Act. *Murphey v. Reed*, Nov. 15, 1948—U. S.—, 93 L. Ed. Adv. Op. 91. The Court remanded the case to the district court with instructions to dismiss causes of action involving solely construction work and to reconsider other causes of action.

In the light of the uncertainty which still exists some four years later as to the applicability of the Fair Labor Standards Act to employees engaged in military construction in the Alaska Aleutian Islands Area, it cannot be said that Appellees did not act as reasonably prudent men in relying upon and conforming with the regulations, orders, rulings, approvals and interpretations of the United States War Department, Corps of Engineers of the United States War Department, and The War Department Wage Administration Agency with respect to their overtime pay policies. The trial court so believed, and accordingly found as a finding of fact, that the acts of the Appellees were "in good faith * * * and in reliance on Administrative regulations, orders, rulings, approvals and interpretations of * * * the United States War Department, The Corps of Engineers of the United States War Department, and The War Depart-

Wage Administration Agency.” This finding is overwhelmingly supported by the record.

III. The Appellees Are Entitled to Relief from Liquidated Damages under § 11 of the Portal-to-Portal Act of 1947.

Section 11 of the Portal-to-Portal Act specifies two conditions under which the Court may, in the exercise of its sound discretion, refuse to award liquidated damages. (See Appendix A, *infra*). The employer must show to the satisfaction of the Court below that (1) his act or omission was in good faith, and (2) he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act.

On this phase of the case the trial court specifically found that the Appellees had met these conditions. (No. 12017, R. 11-12; No. 11984-5, R. 18; No. 11983, R. 17; No. 12018, R. 55.) Again, Appellees point to the fact that both good faith and the reasonableness of the course pursued by Appellees are questions of fact resolved by the trial court in favor of Appellees. (*Supra*, p. 45).

It is also significant that upon the same documentary record and substantially the same testimony the Hon. Lloyd L. Black reached the same conclusion as the court below. See *Wood et al. v. Guy F. Atkinson Co.*, D.C.W.D. Wash., 14 Labor Cases ¶ 64,466.

On the record made in these cases now before this Court, and for the reasons set forth in the preceding pages of this brief, Appellees believe that they are relieved from liability under the provisions of § 9 of the Portal-to-Portal Act of 1947.

Upon this same record, *a fortiori* Appellees are relieved

under § 11 of that Act from liability for liquidated damages. In acting as they did upon the numerous and emphatic regulations, orders, rulings, approvals and interpretations of the War Department, the Corps of Engineers, and the Wage Administration Agency on the justified and reasonable belief that the original construction of military bases was not within the coverage of the Fair Labor Standards Act—a problem not even yet decisively resolved by our courts, (see pp. 50 to 52, *supra*)—Appellees have demonstrated their grounds for relief under § 11.

Suffice it to say that the courts have granted relief under § 11 to others on a far less convincing evidentiary showing. *Central Missouri Telephone Co. v. Conwell*, 8th Cir., 170 F. (2d) 641; *Rogers Cartage Co. v. Reynolds*, 6th Cir., 166 F. (2d) 317; *Ispass v. Pyramid Motor Freight Corporation*, D.C.S.D.N.Y., 78 F. Supp. 475; *Burke v. Mesta Machine Co.*, D.C.W.D. Pa., 79 F. Supp. 588; *Bauler v. Pressed Steel Car Co.*, D.C.N.D. Ill., 15 Labor Cases ¶ 64,751; *Jackson v. Northwest Airlines*, D.C.D. Minn., 76 F. Supp. 121.

CONCLUSION

The Appellees respectfully urge, in accord with the unanimous declaration of the Federal Courts, that §§ 9 and 11 of the Portal-to-Portal Act of 1947 are constitutional.

The record in these causes amply demonstrates that all practices of the Appellees with respect to the payment of overtime compensation to Appellants or Appellants' assignors were in good faith in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretations of the War Department, the Corps of Engineers, and the Wage Administration Agency, and that Appellees had reasonable

grounds for believing that their practices were not a violation of the Fair Labor Standards Act of 1938, as amended.

Therefore, the judgment of the trial court in each of these causes should be affirmed.

Respectfully submitted,

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GERALD DEGARMO

*Attorneys for Appellees S. Birch &
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Morrison-Knudsen Company.*

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APPENDIX A

Sections 9 and 11 of the Portal-to-Portal Act of 1947 provide as follows (Title 29 U.S.C.A. §§ 258 and 260):

“§ 258. Reliance on past administrative rulings, etc.

In any action or proceeding commenced prior to or on or after May 14, 1947 based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. May 14, 1947, c. 52. § 9, 61 Stat. 88.”

“§ 260. Liquidated damages.

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (b) of this title. May 14, 1947, c. 52 § 11, 61 Stat. 89.”

APPENDIX B

For the convenience of the Court we have set forth in this Appendix B the material portions of those exhibits which are not quoted extensively elsewhere in this Brief and which best illustrate the documents and communications between Appellees and the War Department, the Corps of Engineers, and the Wage Administration Agency relating to overtime pay problems.

EXHIBIT 14

**WAR DEPARTMENT
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON**

January 9, 1943

CIRCULAR LETTER No. 2236

(Labor Relations Branch No. 8)

Subject: Policy of the Construction Division for Non-Manual Employees on Fixed-Fee, Architect-Engineer, and Construction Contracts.

To: All Concerned.

1. The following requirements as to the hours of work, overtime allowances, and provisions for leave accrual for all non-manual employees of cost-plus-a-fixed-fee principal and subcontractors in connection with the construction projects will be included in all future negotiations for such contracts (See Exhibits Nos. 10, 11 and 12, Contract Negotiations Manual). The provisions of subparagraphs *a* to *l*, inclusive, of paragraph 5, below, now appear in "Appendix C", incorporated in and made a part of W.D. Contract Forms Nos. 3, 4 and 12, as set forth in Procurement Regulations, and also appear in the same contract forms as Exhibits 17, 16 and 18, respectively, of the Contract Negotiations Manual.

2. Attention is invited to the fact that subparagraphs *a* to *l*, inclusive, of paragraph 5 below, have been prescribed

as contract provisions by Headquarters, Services of Supply, as indicated in Procurement Regulations, and no material deviation therefrom can be made without the approval of that Headquarters. The provisions of subparagraphs m to r, inclusive, of paragraph 5, below, prescribed by the Chief of Engineers must be adhered to in negotiating and administering all cost-plus-a-fixed-fee principal and subcontracts in connection with construction, except in extraordinary cases where authority to deviate therefrom has been obtained in advance from the Division Engineer.

3. Attention is invited to the fact that those portions of subparagraphs a to l, inclusive, of paragraph 5, below, which prescribe double time for work on the seventh consecutive day and time and one-half for work on the specified holidays, are derived from Executive Order 9240, and compliance therewith since October 1, 1942, is mandatory. All salary schedules containing provisions relative to overtime or premium payments which have heretofore been prescribed or approved in connection with any contract and which provisions might be considered to be in any manner inconsistent with the mandatory provisions of Executive Order 9240, as listed above, are hereby modified to the extent necessary to permit compliance with the mandatory provisions of that Executive Order. For record evidence of modification of such provisions, a copy of this circular letter shall be filed with the Contracting Officers' and Disbursing Officers' copies of the contract.

4. The policies set forth in subparagraph a to r, inclusive, of paragraph 5, below, shall be applicable to all cost-plus-a-fixed-fee principal and subcontracts hereafter placed in connection with construction activities.

5. Requirements as to hours of work, overtime and leave allowances for non-manual employees of cost-plus-a-fixed-fee principal and subcontractors:

- a. "Non-manual employees" are those employees who are not "Laborers and mechanics" within the meaning of the Davis-Bacon Act. Specifically, the term "non-manual employees" has been interpreted to include all occupations not involving manual labor directly in connection with construction work. The following is a list (not all-inclusive) of typical "non-manual" occupations:

* * *

- b. For this purpose, non-manual employees will be classified in the following groups:

* * *

- (2) Group "B". Employees whose base salaries are between \$50.00 and \$90.00 per week, inclusive, except those included in groups "D" and "E".
- (3) Group "C". Employees whose base salaries are in excess of \$90.00 per week, except those included in Groups "D" and "E".

* * *

- c. The base salaries of *all* employees of Groups "A", "B" and "C" will be established on the basis of a minimum work week of 48 hours.

* * *

- e. Group B Employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. They will be paid at the rate of two times straight time (the weekly salary divided by 48) for all work which they are required to perform on the seventh consecutive day.
- f. Group "C" Employees will be considered supervisory or executive employees, and will be expected to work any necessary number of hours (including work on Sundays) without payment of additional compensation.

6. At the time of the assignment of a non-manual employee, each cost-plus-a-fixed-fee principal or subcontractor shall furnish such employee with a statement of the conditions of his employment in conformity with the provisions of this circular letter and such deviations from subparagraphs *m* to *r*, inclusive, of paragraph 5, above, as the Division Engineer may have authorized. This statement, insofar as practicable, shall follow the attached form (see inclosure 2).

7. Labor Relations Officers will attend all contract negotiations, as required, for the purpose of providing information regarding the employment and salaries of contractors' employees. Negotiations held in Washington will be attended by the Chief of the Labor Relations Branch, or his designated representative; negotiations held in the field will be attended by the Division Labor Relations Officer.

By order of the Chief of Engineers:

/s/ C. D. BARKER

Lt. Col., Corps of Engineers

Chief, Labor Relations Branch,
Construction Division.

EXHIBIT 15

WAR DEPARTMENT
ARMY SERVICE FORCES
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON

May 13, 1943

CIRCULAR LETTER No. 2390

Labor Relations Branch No. 16

Subject: Policy for Non-Manual Employees on Cost-Plus-A-Fixed-Fee Architect-Engineer and Construction Contracts.

To: All Concerned.

* * *

2. The instructions below shall be followed in the negotiation and administration of cost-plus-a-fixed-fee principal and subcontracts thereunder negotiated on or after May 1, 1943. Where necessary, because of extraordinary conditions, authority to deviate therefrom shall be obtained in advance from this office. Circular letter No. 2236 (Labor Relations Branch No. 8) dated January 9, 1943, shall not be applicable to contracts negotiated on or after May, 1943.

3. The following provisions regarding eligibility for employment, hours of work, salaries, overtime and holiday payments, and leave privileges for all non-manual employees in connection with construction projects will be included in the record of all future negotiations for cost-plus-a-fixed-fee principal and subcontracts.

a. *Definition and Classification of Non-Manual Employees:*

- (1) "Non-Manual employees" are those employees who are not "laborers and mechanics" within the meaning of the Davis-Bacon Act. Specifically, the term "non-manual employees" has been interpreted to include all occupations not in-

volving manual labor directly in connection with construction work. Custodial employees are included within the term "non-manual employees." The following is a list (not all inclusive) of typical "non-manual" occupations:

* * *

- (2) Non-Manual employees will be classified in the following groups:

* * *

(b) Group "B", Employees whose base salaries are over \$53.31 and not over \$90.00 per week.

(c) Group "C", Employees whose base salaries are over \$90.00 per week.

* * *

c. *Base Salaries:*

- (1) The base salaries of all employees in Group "A" and "B" will be established on the basis of a work week of 40 hours. The base salaries of all employees in Group "C" will be established on the basis of a minimum work week of 48 hours.

* * *

f. *Overtime Payments:*

* * *

- (2) Group "B" employees will be paid at the rate of straight time for all work which they are required to perform in excess of 40 hours per week.
- (3) Group "C" employees will work any necessary number of hours (including work on Sundays) without payment of additional compensation.

4. At the time of the assignment of a non-manual employee, each cost-plus-a-fixed-fee principal or subcontractor shall furnish such employee with a statement of the conditions of his employment in conformity with the provisions of this circular letter and such deviations as may have been authorized. This statement, insofar as practicable, shall follow the attached form (see inclosure No. 2).

5. Labor Relations Officers will attend all contract negotiations, as required, for the purpose of providing information regarding the employment and salaries of contractors' employees. Negotiations held in Washington will be attended by the Chief of the Labor Relations Branch, or his designated representative; negotiations held in the field will be attended by the Division Labor Relations Officer.

* * *

7. The provisions of this circular letter shall not apply to employees engaged on work prosecuted outside the continental limits of the United States.

By order of the Chief of Engineers:

/s/ C. D. BARKER
Lt. Col., Corps of Engineers,
Chief, Labor Relations Branch,
Construction Division

EXHIBIT 16**(Part 1)****ALASKA****WAR DEPARTMENT
WAGE ADMINISTRATION AGENCY
WASHINGTON, D. C.**

27 April, 1944

Subject: Salary Schedule for Non-Manual Employees working in Alaska on Cost-Plus-a-Fixed-Fee Construction Projects.

To: Commanding General, Alaska Department,
Thru: Chief, Base Echelon, Alaskan Department
1331 3rd Avenue Building, Seattle, Washington

To: Commanding General, Northwest Service Command.
Thru: Chief of Engineers, Washington, D. C.

1. Under authority granted to the War Department Wage Administration in connection with Executive Orders No. 9250 and No. 9328 by the National War Labor Board (General Order No. 14) and by the Commissioner of Internal Revenue (Letter of 24 December 1942) the following action is taken on the request for a uniform non-manual wage structure in Alaska.

2. Reference is made to 1st Indorsement dated 12 April 1944, from Chief, Base Echelon, to the basic letter, dated 12 April 1944, from the Seattle District Engineer on behalf of the Contracting Officer, Alaskan Department, Subject: "Approval of Salary Ranges of Non-Manual Employees of Cost-Plus-a-Fixed-Fee Contractors Engaged in Construction of Military Facilities for the Alaskan Department, U. S. Army." Reference is also made to the supplemental transmittal letter, dated 20 April 1944, from Mr. J. I. Noble for the Engineer, Alaskan Department, Subject: "Policy of the Alaskan Department governing Non-manual Employees of

C.P.F.F. Contractors." Further reference is made to discussions held by this office with Mr. J. I. Noble and the Labor Officer of the Northwest Service Command.

3. Approval is hereby given to the inclosed salary schedule and statement of policy governing Non-Manual Employees of C.P.F.F. Architect-Engineer and Construction Contractors on work in Alaska under the jurisdiction of the Alaskan Department, effective on all contracts awarded after 15 September 1943, and on work in Alaska under the jurisdiction of the Northwest Service Command, effective on contracts awarded after the date hereof. In accordance with War Department Memorandum No. W 600-44 dated 25 March 1944 the same salary schedule and statement of policy will be effective on all future C.P.F.F. Contracts employing citizens of the United States in Canada under the jurisdiction of the Northwest Service Command.

4. The Agency has examined the rates which the contractors have been paying their employees between 15 September 1943, and the date of his ruling and hereby approves those rates for such employees. Also, in this interval, the old job designations have been used on some of the payrolls, the equivalent old designations being as shown on the organization charts inclosed with the reference basic letter. Such use of old designations is hereby approved on such payrolls as have been already processed too far to recall for correction.

5. Attention is invited to the fact that the War Department Wage Administration Agency has been granted specific authority, by agreement between the National War Labor Board and the 12th Regional War Labor Board, to take jurisdiction over the request of the Alaskan Department and the Northwest Service Command for approval of the schedule and policies referred to in paragraph 3 above. This authority was granted the Agency as a result of a telephone

conversation on 20 April 1944, between Dr. G. B. Noble, Chairman of the 12th Regional War Labor Board, Mr. Robert W. Burns of the National War Labor Board and Mr. E. A. Hammesfahr, Assistant to Dr. George W. Taylor, Vice-Chairman of the National War Labor Board.

By Order of the Secretary of War:

The War Department Wage Administration Agency.

/s/ JOHN R. ABERSOLD

John R. Abersold

Chief

* * *

3. Inclosures:

1. "Statement of Policy Governing Cost-Plus-a-Fixed-Fee Contractors Non-Manual Employees Working in Alaska."
2. "Non-Manual Salary Schedule for Alaska Job Site and Supporting Offices in Mainland Alaska Towns."
3. "Job Descriptions—Non-Manual Employees of Cost-Plus-a-Fixed-Fee Principal and Subcontractors."

Statement of Policy Governing Cost-Plus-a-Fixed-Fee Contractors Non-Manual Employees Working in *Alaska*

1. The following conditions as to the hours of work, overtime, allowances, and provisions for leave accrual for non-manual employees of cost-plus-a-fixed-fee principal and subcontractors in connection with construction projects in Alaska will be included in all negotiations for such contracts under the jurisdiction of the Alaskan Department and the Northwest Service Command. These conditions apply only to non-manual employees the principal part of whose work under the contract is performed within the territory of Alaska or in that part of Canada under the jurisdiction of the Northwest Service Command.

2. "Non-Manual employees" are those employees who are not "laborers and mechanics" within the meaning of the Davis-Bacon Act. Specifically, the term "non-manual employees" has been interpreted to include all occupations not involving manual labor directly in connection with construction work. * * *

3. For this purpose, non-manual employees will be classified in the following groups:

* * *

b. Group "B". Employees whose base salaries are between \$50.00 and \$90.00 per week, inclusive, except those included in Groups "D" and "E".

c. Group "C". Employees whose base salaries are in excess of \$90.00 per week, except those included in Groups "D" and "E".

* * *

4. The base salaries of *all* employees of Groups "A", "B", "C" and "E" will be established on the basis of a minimum work week of 48 hours. Base wages of culinary employees are established on a daily shift of eight hours.

The straight time hourly rate shall be the daily shift wage divided by 8, the weekly salary divided by 48, the monthly salary divided by 208 or the yearly salary divided by 2496.

* * *

6. Group "B" employees will be expected to work any reasonable number of hours six (6) days per week, without payment of additional compensation. They will be paid at the rate of two times straight time for all work which they are required to perform on the seventh consecutive day worked in the scheduled work week.

7. Group "C" employees will be considered supervisory or executive employees, and will be expected to work any necessary number of hours (including work on the seventh day) without payment of additional compensation.

EXHIBIT 16

(Part 2)

SEATTLE

**WAR DEPARTMENT
WAGE ADMINISTRATION AGENCY
WASHINGTON, D. C.**

27 April 1944

Subject: Salary Schedule for Non-Manual Employees Performing Work in Seattle Headquarters Offices of the C.P.F.F. Architect-Engineer and Construction Contractors under the Jurisdiction of the Alaskan Department.

To: Commanding General, Alaskan Department,
Thru: Chief, Base Echelon, Alaskan Department,
1331 Third Avenue Building, Seattle, Washington

1. Under authority granted to the War Department Wage Administration Agency in connection with Executive Orders No. 9250 and No. 9328 by the National War Labor Board (General Order No. 14) and by the Commissioner of

Internal Revenue (Letter of 24 December 1942) the following action is taken on the request of the Alaskan Department for a uniform non-manual wage structure.

2. Reference is made to 1st Indorsement dated 12 April 1944, from Chief, Alaskan Base Echelon, to basic letter, dated 12 April 1944 from Seattle District Engineer on behalf of the Contracting Officer, Alaskan Department, Subject: "Approval of Salary Ranges of Non-Manual Employees of Cost-Plus-a-Fixed-Fee Contractors Engaged in Construction of Military Facilities for the Alaskan Department, U. S. Army" and to the supplemental transmittal letter, dated 20 April 1944, from Mr. J. I. Noble for the Engineer, Alaskan Department, Subject: "Policy of the Alaskan Department Governing Non-Manual Employees of C.P.F.F. Contractors."

3. Approval is hereby given to the inclosed salary schedule and the statement of policy governing Non-Manual Employees engaged in work in the Seattle Headquarters Offices of C.P.F.F. Architect-Engineer and Construction Contractors in connection with contracts under the jurisdiction of the Alaskan Department, Subject to the following provisions:

- a. This approval is to be effective on all work performed in the said offices beginning 1 November 1943 whether such work is in connection with new contracts or with completion of existing contracts.
- b. Between the dates of the new contracts, 30 September 1943, and the conversion to the new basic work week on 1 November 1943, work is authorized on the new contracts under the salary schedules and employment policies existing on the old contracts, it being understood that the old employees carried the majority of the new work during this period.
- c. In the case of new hires in those designations on the inclosed salary schedule which are marked with an asterisk (*) the contractor shall begin the employees

at, or near, the minimum rate shown except that, when the applicant possesses exceptional skill or qualifications, the contracting officer may approve an appropriate starting salary within the approved range.

- f. The Agency has examined the rates which the contractors have been paying their employees between the effective dates as outlined above and the date of this ruling and hereby approves those rates for such employees. Also, in this interval, the old job designations have been used on some of the payrolls, the equivalent old designations being as shown on the organization charts inclosed with the reference basic letter. Such use of old designations is hereby approved on such payrolls as have been already processed too far to recall for correction.

By Order of the Secretary of War:

The War Department Wage Administration Agency

/s/ JOHN R. ABERSOLD

John R. Abersold

Chief

* * *

3. Inclosures:

1. "Statement of Policy Governing Cost-Plus-a-Fixed-Fee Contractors Non-Manual Employees Working in Continental United States on Contracts under the jurisdiction of the Alaskan Department."
2. "Non-Manual Salary Schedule for Seattle Headquarters Offices of Cost-Plus-a-Fixed-Fee Contractors on Alaskan Military Construction."
3. "Job Descriptions—Non-Manual Employees of Cost-Plus-a-Fixed-Fee Principal and Subcontractors."

**WAR DEPARTMENT
ALASKAN DEPARTMENT**

**Statement of Policy Governing Cost-Plus-a-Fixed-Fee
Contractors' Non-Manual Employees Working in
Continental United States on Contracts Under
the Jurisdiction of the Alaskan Department**

1. The following provisions shall apply to all non-manual employees working in the Seattle Headquarters Offices of Cost-Plus-a-Fixed-Fee prime contractors and sub-contractors engaged on military construction contracts under the jurisdiction of the Alaskan Department. These conditions shall also apply to any sub-project work in continental United States that is performed as a part of, or in support of, Alaskan construction, except that, for sub-projects in areas other than Seattle, the salary schedules applied to the work shall have individual approval of the War Department Wage Administration Agency. Negotiations are now in progress to extend the work of present Alaskan contractors to new projects and the existing Seattle Staffs will be expected to start the new work while completing the old. It is therefore required that these provisions shall be put into effect in the offices of such contractors as soon as conversion to the new basic work week and salaries can be conveniently effected. In any event the conversion shall be accomplished by 1 November 1943 and shall embrace all employees whether engaged full time on the new projects or not. All future contractors under the jurisdiction of the Alaskan Department will be governed by these provisions until and unless deviations are authorized by the Commanding General.

2. *Definition and Classification of Non-Manual Employees:*

- a. "Non-manual employees" are those employees who are not "laborers and mechanics" within the meaning of the Davis-Bacon Act. Specifically, the

term "non-manual employees" has been interpreted to include all occupations not involving manual labor directly in connection with construction work. * * *

* * *

- b. Non-manual employees will be classified in the following groups:

* * *

(2) Group "B". Employees whose base salaries are over \$53.31 and not over \$90.00 per week.

(3) Group "C". Employees whose base salaries are over \$90.00 per week.

* * *

4. *Base Salaries:*

- a. The base salaries of all employees in Groups "A" and "B" will be established on the basis of a work week of 40 hours. (The straight time hourly rate for such employees shall be the approved weekly rate divided by 40.) The base salaries of all employees in Group "C" will be established on the basis of the regularly established work week of the contractor involved.

* * *

7. *Overtime Payments:*

- b. Group "B" employees will be paid at the rate of straight time for all work which they are required to perform in excess of 40 hours during the first six days worked of any regular scheduled work week, and at the rate of two times straight time for all work which they are required to perform on the seventh day worked of such work week.

* * *

- d. Group "C" employees will work any necessary number of hours (including work on the seventh day) without payment of additional compensation.

EXHIBIT 17**WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON**

August 27, 1942

GUY F. ATKINSON Co.
O'Shea Bldg.,
Seattle, Wash.
Attention: Mr. Doyle

Gentlemen:

The following policy of the Office, Chief of Engineers in relation to working conditions of non-manual employees of all cost-plus-a-fixed-fee contractors is hereby authorized on your contract No. W-869-eng-7100:

a. Group A. Employees whose base salaries are less than \$50 per week will be paid at the rate of straight time for all work they are requested to perform in excess of 44 hours per week.

b. Group B. Employees whose basic salaries are between \$50 and \$90 per week will be expected to work any reasonable number of hours $5\frac{1}{2}$ days per week without payment of additional compensation. They will be paid straight time (the weekly salary divided by 44) for all work which they are required to perform in excess of $5\frac{1}{2}$ days and on the seventh day.

c. Group C. Employees will be considered key employees and will be expected to work any necessary number of hours (including work on the seventh day) without additional compensation.

The above policy is mandatory and will be strictly adhered to.

For the District Engineer:

Very truly yours,

/s/ A. B. SMITH,
Captain, Corps of Engineers,
Executive Assistant.

EXHIBIT 19**WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON**

February 20, 1943

GUY F. ATKINSON COMPANY,
Contract W-869-eng-7100
1524 Fifth Avenue
Seattle, Washington

Gentlemen:

Confirming verbal advice to Mr. Guy F. Atkinson relative to the employment of non-manual employees on Contract W-869-eng-7100, you are hereby advised that the Officer in Charge of Alaska Construction has directed that the policy outlined in the inclosed Circular Letter 2236 shall apply with the exception of the salary schedule attached thereto, also that the wording "Officer in Charge of Alaska Construction" shall be substituted for District Engineer in paragraph 5k and that paragraph 5l shall be inapplicable.

For the District Engineer:

Very truly yours,

/s/ J. D. LANG

J. D. Lang,

Lt. Col., Corps of Engineers,

Executive Officer — Alaska Services.

EXHIBIT 22**GUY F. ATKINSON COMPANY**

October 20, 1943

The District Engineer
United States Engineer Office
700 Central Building
Seattle, Washington

Attention: Chief, Alaska Operations Division

Subject: Field Organization Schedule Adak Depot Project
Alaska Contract No. W 45-108-eng 202

Dear Sirs:

We submit herewith for approval, schedule of classifications and weekly salary ranges covering all anticipated non-manual administrative, supervisory and clerical positions for our work on the Adak Depot Project.

* * *

The rate schedule as submitted represents a description of like rate schedules which have been already approved and in effect on previous work in Alaska, and were established for a basic 48-hour week and on a contemplated 7 day, 56 hours per week job operation. Included in this rate schedule are a few rates under which gross inequities and serious difficulties were encountered on the Alaska Barge Terminal Project, for the reason that regulations prescribing computation of overtime earnings, promulgated after the establishment of this rate schedule, resulted in responsible administrative and supervisory personnel receiving considerably less than their assistants or even less than comparatively low-rated manual workmen and foremen under their supervision.

* * *

We wish to emphasize the fact that we will undertake

to prosecute work on this Project to the best of our ability but that our performance must be contingent upon obtaining approval of a schedule of rates that will enable us to secure and retain the necessary administrative and supervisory personnel, as well as laborers and skilled workmen.

Very truly yours,

GUY F. ATKINSON COMPANY
/s/ Guy F. Atkinson
Chairman of the Board

EXHIBIT 24

WAR DEPARTMENT UNITED STATES ENGINEER OFFICE SEATTLE, WASHINGTON

29 Oct. 43

Guy F. Atkinson Company
O'Shea Building
Seattle, Washington

Gentlemen:

You are directed on or before 1 November 1943 to effect in your Seattle Office, servicing contracts in Alaska, the following policy:

* * *

c. . . . On those employees whose base salaries are over \$53.31 and not over \$90.00 per week, straight time shall be paid for all work required in excess of 40 hours per week the first 6 days of the scheduled work week and will be paid at two times the straight time for all work performed on the seventh consecutive day of the scheduled work week.

* * *

You are further directed to work all employees 5½ days per week or 44 hours.

The above shall apply to your work under contract W-869-eng-7100 and will be used as a basis for approvals of employees shifted to work under contract W-45-108-eng-202.

Very truly yours,

/s/ GEORGE F. TAIT

George F. Tait

Major, Corps of Engineers,
Contracting Officer.

EXHIBIT 25

5 November 1943

Guy F. Atkinson Company
1524 Fifth Avenue
Seattle, Washington

Subject: Field Organization Schedule, Adak Depot Project,
Alaska Contract W45-108-eng-202.

Gentlemen:

Reference is made to your letter on the above subject dated 20 October 1943, wherein approval of Field Organization Chart (Drawing No. 1002-B) and Organization Schedule for the Adak Depot Project is requested.

You are advised that your letter with inclosures was forwarded to the Engineer, Alaskan Department, by letter dated 20 October 1943, file SE 161 (Adak Depot 202.5) 1 PADBL 2Y. In first indorsement thereto, dated 24 October 1943, the Engineer, Alaskan Department, approved the Organization Chart and Schedule without change and recommended that action be taken to adjust the salary range for Assistant Superintendents as proposed in your letter.

In order to obtain approval for adjustment in an estab-

lished salary range, it will be necessary that your office prepare appropriate request on forms prescribed by the Treasury Department for submitting to higher authority. This office will furnish the necessary forms and assist in forwarding your request through proper government channels.

Very truly yours,

/s/ GEORGE F. TAIT
George F. Tait,
Major, Corps of Engineers,
Contracting Officer.

EXHIBIT 26

November 15, 1943

The District Engineer
United States Engineering Office
700 Central Building
Seattle 4, Washington

Attention: Contracting Officer, Contract No. W-45-108-eng-202

Subject: Adak Headquarters Organization Schedule—Adak Depot Project Contract No. W-45-108-eng-202

Dear Sir:

We submit herewith for approval, schedule of classifications and weekly salary ranges covering all anticipated non-manual administrative, supervisory, clerical and engineering positions for our Seattle Headquarters Office, in connection with the Adak Depot Project.

The various features of the foregoing schedule of classifications and salary ranges are essentially the same as applied to our Alaska Barge Terminal Project, and have been under thorough discussion with your representatives during the

past several weeks. In order that our employment and payroll records may be cleared and brought up to date, we would appreciate receiving your consideration, approval, and any further instructions, at your earliest convenience.

Yours very truly,

GUY F. ATKINSON COMPANY
/s/ RAY H. NORTHCUTT
Ray H. Northcutt
Project Manager

EXHIBIT 27

**WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON**

30 November 1943

Guy F. Atkinson Company,
1524 Fifth Avenue
Seattle, Washington

Subject: Organization Schedule, Seattle Headquarters Office.

Gentlemen:

Reference is made to your letter of 15 November 1943 wherein you request approval of schedule of classifications and weekly salary ranges for positions in your Seattle Headquarters Office in connection with Contract W-45-108-eng-202.

* * *

With the exception of the salary range for Personnel Manager, the organization schedule as submitted in your letter is approved and authorized for use effective 1 November 1943. Also approved is the organization chart identified as Drawing No. 1002-A, dated 14 November 1943, which accompanied the range schedule.

Until such time as approval is received from the War

Labor Board to increase the salary range for the Personnel Manager, the approved range shall be considered to be \$80-\$100, consistent with established rates for this classification.

Very truly yours,

/s/ GEORGE F. TAIT
George F. Tait,
Major, Corps of Engineers,
Contracting Officer.

EXHIBIT 33

**WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON**

12 Feb. 1944

Birch-M. K.
330 Central Building
Seattle 4, Washington

Gentlemen:

Reference is made to your letter of 27 January 1944, requesting authority to operate your Seattle Office on a 48-hour per week basis.

Base salaries not exceeding \$90 per week are to apply to a 40-hour work week. For such employees, you are authorized 8 hours overtime on the sixth day worked as long as, or at such time as, they can be usefully employed. Required work in excess of eight hours per day, and/or 48 hours per week, shall be considered extraordinary overtime and shall be reimbursable only with the prior approval of the Contracting Officer. Requests for a prior approval shall be made on an approved form, listing the individuals involved, the anticipated extent of the overtime, and a sufficient and valid

reason therefor. Completion of the day's regular duties shall not be considered a valid reason for overtime.

Overtime pay shall be in accordance with the Chief of Engineer's Circular Letter 2390, a copy of which has already been furnished to you.

Base salaries exceeding \$90 per week shall constitute full compensation for all work necessary in the performance of the employee's duties and functions. Employees who are predominantly administrative or supervisory are intended to be in this group.

Very truly yours,

/s/ GEORGE F. TAIT
George F. Tait,
Major, Corps of Engineers,
Contracting Officer.

EXHIBIT 34

**WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON**

13 February 1944

Birch-M. K.
330 Central Building
Seattle 4, Washington

Gentlemen:

Reference is made to your letter of 27 January 1944, requesting approval of the establishment of a 70-hour work week for the office employees of yourselves and your sub-contractors at the site of the work on your three contracts in the Aleutians.

In accordance with the terms of the contracts, it is anticipated that the work will be carried on in two shifts of 10 hours each daily. However, this schedule is subject to ad-

justment according to the availability of men and materials, weather conditions, changes of program, hazards of war, and the like. It will be necessary for your non-manual employees to work any reasonable number of hours per day during the first six days of a week to fulfill their functions. However, no overtime benefits shall accrue on the first six days. Under normal conditions it will be necessary for the non-manual employees to continue their operations of two 10-hour shifts on the seventh day of the work week to keep pace with the manual operations, and double time will be paid Class B employees for work performed on the seventh consecutive day of the work week. This does not mean that every non-manual employee will be paid for 20 hours work on the seventh day, whether or not there is gainful work to be done. Seventh day work for non-manual employees is therefore authorized, subject to the requirements of the work as determined by the authorized representative of the Contracting Officer in direct charge of the work at the job site.

Very truly yours,

/s/ GEORGE F. TAIT

George F. Tait,
Major, Corps of Engineers,
Contracting Officer.

EXHIBIT 39**202 JOB OFFICE**

March 18, 1944

To: The Resident Engineer, A.P.O. No. 980, U.S. Army*From:* Guy F. Atkinson Company, 202 Job Office**Re: Non-Manual Employees**

Under the labor provisions of our contract, Article 8, paragraph b., Group "B" employees are expected to work any reasonable number of hours during the first six of the work week at straight time. We believe the interpretation of "reasonable number" to be eight hours.

In the interest of economy and general efficiency on the job, it is our opinion that numbers of non-manual employees in Group "B" be required to work ten hours per day to conform to the hours of work of manual employees over whom the non-manual employees are exercising checking supervision. For the additional two hours per day we believe the non-manual employees are entitled to overtime payments in conformity with the provisions of the job contract and Executive Order No. 9240.

Your favorable consideration is earnestly solicited.

Yours very truly,

GUY F. ATKINSON COMPANY

E. B. Skeels

Job Manager

EXHIBIT 40

**HEADQUARTERS ALASKAN DEPARTMENT
OFFICE OF THE ENGINEER
APO 942, C/O POSTMASTER, SEATTLE, WASHINGTON**

5 April 1944 C

Guy F. Atkinson Company
APO 980 U. S. Army

Gentlemen:

Receipt of your letter of 18 March 1944 requesting approval for the payment of overtime to Group B non-manual employees is acknowledged.

Payment of overtime compensation to Group B non-manual employees would be in violation of Executive Order No. 9240. For the payment of overtime, Government regulations define Group B employees as follows:

“Group B employees will be expected to work any reasonable number of hours six (6) days per week without payment of additional compensation. They will be paid at the rate of two times straight time (the weekly salary divided by 48) for all work which they are required to perform on the seventh consecutive day.”

This stipulation under Executive Order No. 9240 was made a part of your Contract W 45-108-eng-202 and is contained in paragraph d, Article VIII thereof.

This factor was taken into consideration when the field organization schedule of non-manual employees under Contract W 45-108-eng-202 was established and approved for your Company. Accordingly, this Headquarters cannot approve the request contained in your letter of 18 March.

For the Engineer:

Very truly yours,

/s/ L. B. DeLong

L. B. DeLong,

Colonel, Corps of Engineers
Engineer, Construction Div.

EXHIBIT 43

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON

3 May 1944

Guy F. Atkinson Company
1524 Fifth Avenue
Seattle, Washington

Gentlemen:

Inclosed are copies of the rulings of the War Department Wage Administration Agency covering the non-manual wage structure of contractors for the Alaskan Department. These rulings are in three parts as follows:

a. Salary Schedule for Non-Manual Employees Working in Alaska on Cost-Plus-a-Fixed-Fee Construction Projects.

b. Salary Schedule for Non-Manual Employees Performing Work in Seattle Headquarters Offices of the Cost-Plus-a-Fixed Fee Architect-Engineer and Construction Contractors Under the Jurisdiction of the Alaskan Department.

c. Application of Employees Temporarily Assigned to Emergency Work at La Porte, Indiana of Salary Schedule for Non-Manual Employees of Seattle Headquarters Offices.

* * *

Very truly yours,

/s/ J. I. NOBLE
J. I. Noble,
Contracting Officer

EXHIBIT 48

**POST HEADQUARTERS
OFFICE OF THE RESIDENT ENGINEER
APO 980, C/O POSTMASTER, SEATTLE, WASHINGTON**

10 June 1944

Subject: Salary Schedule for non-manual employees working in Alaska on CPFF construction project.

To: CPFF Contractors, this station.

1. Reference is made to letter from this office dated 5 June 1944, which is rescinded and superseded by the following instructions:

“Effective immediately, classifications of non-manual employees, wage-rates and ranges for CPFF contracts, per schedule approved by the War Department Wage Agency over signature of John R. Abersold by letter to the Commanding General, Alaskan Department dated 27 April 1944 and forwarded to all CPFF Contractors with letter dated 2 May 1944 by J. I. Noble, Contracting Officer, all CPFF contracts will adopt subject approved schedule. Only designations will be changed as 1st step, with change over made effective first opportunity but not later than week commencing 11 June 1944. Any necessary new statements of employee status forms will be prepared and be completed in Seattle from payrolls as received there from project. No wage adjustments to be effective until classification changes and present operations cleared. By authority of Engineer, Alaskan Dept., Radiogram AECC 19 dated 9 June 1944.”

2. The last sentence above is interpreted by this office that you are directed not to make any change in present base rate of pay now in effect.

J. M. McGREEVY
Colonel, Corps of Engineers
Contracting Officer

EXHIBIT 58

From Robins Acting OCE Washington DC 311838z
To Seattle Engineer District Seattle Wash

GRNC

Reurlet dated 22 January 1945 subject applicability of Fair Labor Standards Act to CFPP contractors no regulations superseding circular letter 2390 have been issued claims of employees of CPFF contractors paid in accordance with C L 2390 should be investigated and reported as outlined in paragraph 750.23 orders and regulations end speed 9159

1851Z

Action Copy: Als Div.

US Engr Ofc

Jan 31 45 12 49A rw

EXHIBIT 59

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
SEATTLE, WASHINGTON

7 February 1945

Guy F. Atkinson Company
 1524 Fifth Avenue
 Seattle, Washington

Subject: Claims for Additional Compensation Under Fair Labor Standards Act.

Gentlemen:

By letter dated 3 October 1944 from the Contracting Officer, information was furnished to your office outlining the efforts of this office to establish an administrative policy for guidance in handling claims for additional compensation based on Fair Labor Standards Act regulations.

In response to our inquiry, the Office, Chief of Engineers

has recently re-affirmed previous instructions that regulations of Circular Letter 2390 are currently applicable to operations of Cost-Plus-a-Fixed-Fee Contractors. In view of these instructions, claims based on alleged violations of the Fair Labor Standards Act shall continue to be denied by the Contracting Officer.

* * *

Very truly yours,

/s/ D. M. PELTON

D. M. Pelton,
Captain, Corps of Engineers,
Contracting Officer

APPENDIX C

Analysis of Exhibits 1 to 12, Inclusive, and 80 Relating to the Authority of the Individuals Issuing or Signing the Documents and Communications Received by Appellees

- (a) Authority of Commanding General, Alaska Defense Command, Engineer, Alaska Defense Command, the Contracting Officers, and District Engineer, Seattle, in Connection with Execution and Administration of Contracts prior to November 1, 1943.

Pursuant to the provisions of the First War Powers Act (50 U.S.C.A. App. § 611) the President conferred upon the Secretary of War the authority to negotiate contracts for military construction and provided that this authority might be exercised by such other officer or officers as the Secretary of War might designate. (Title I, Par. 1, Executive Order No. 9001, dated December 27, 1941; 6 F.R. 6787; 3 C.F.R. Cum. Supp. p. 1055; 50 U.S.C.A. App. p. 242; see also Army Procurement Regulations, 10 C.F.R. Cum. Supp. § 81.107, p. 3293).

By order of the Secretary of War, on March 11, 1942 there was vested in the Commanding General, Western Defense Command (hereinafter called C.G., W.D.C.) jurisdiction over Alaskan military construction in the following language:

“a. Complete jurisdiction over and responsibility for military construction activities and real estate leases in Alaska, including administration of existing construction contracts and leases is vested in you.”

* * *

“d. All military construction and real estate leasing activities of the Engineer Department, Division of District Engineer, in Alaska, are transferred to the jurisdiction of such engineer of your command as you may designate.” (Ex. 1-A)

The Commanding General, Western Defense Command, was by this directive authorized to provide the effective date of this assumption of jurisdiction and he was also authorized to

“designate the District Engineer, Seattle, to continue to perform, all, or such ones as you may wish, of the services he now performs in connection with construction and real estate matters in Alaska except command functions and contracting other than for supplies and materials. Some of the matters in which the Chief of Engineers believes the District Engineer, Seattle, may be of assistance and which you may wish him to continue to perform as at present, are design, fiscal, accounting, cost, procurement and personnel matters.”

On April 21, 1942 the C.G., W.D.C. transferred certain portions of this jurisdiction to the Commanding General, Alaska Defense Command (hereinafter referred to as the C.G., A.D.C.) subject to the supervision of the C.G., W.D.C. in the following language (Ex. 1-B):

“2. Effective midnight April 30-May 1, 1942, the Commanding General, Alaska Defense Command, under the Commanding General, Western Defense Command, will be responsible for the execution of Army construction projects and for leasing real estate in Alaska, including the projects being accomplished by the Navy Department at Sitka, Kodiak and Dutch Harbor. * * *

“3. The Commanding General, Alaska Defense Command, will initiate construction projects in the following manner:

* * *

“5. The Area Engineer, Alaska, is designated the Officer in Charge of Alaska Construction. The Army Liaison Officer with Navy Contract No. 3570, designated as his assistant. Both these officers are placed under the Commanding General, Alaska Defense Command, for the purpose of carrying out this directive.

"8. Cost, progress, finance, personnel and other records, documents and periodic reports and cost accounting will be continued as at present *in accord with Engineer Department regulations*, and will be submitted to the Chief of Engineers in accordance with existing procedure.

* * *

"9. The Officer in Charge of Alaska Construction and designated *contracting officers in Alaska will be governed by the same procedure governing Corps Area and Department Engineers.*"

Thereafter the C.G., W.D.C. requested of the Chief of Engineers "that the District Engineer, Seattle, be designated to continue all of the services he now performs in connection with construction and real estate matters in Alaska, except command functions and contracting other than for supplies and materials" (Ex. 1-C). This request for the service of the District Engineer, Seattle, was granted by order of the Chief of Engineers under date of May 6, 1942 (Ex. 1-E).

Subsequent to the transfer of authority from the C.G., W.D.C. to the C.G., A.D.C. on April 21, 1942 (Ex. 1-B) the authority of the C.G., A.D.C. on May 4, 1942 was augmented in respects not here material (Ex. 3) and on July 17, 1943, a directive from the C.G., W.D.C. to the C.G., A.D.C. restated the authority of the C.G., A.D.C. as follows (Ex. 1-G):

"4. The Commanding General, Alaska Defense Command, under the Commanding General, Western Defense Command and Fourth Army, is responsible for execution of Army construction projects in Alaska * * *

* * *

"7. The District Engineer, Seattle, *in accordance with existing instructions from the Chief of Engineers* and the Division Engineer, Pacific Division, will continue the services he now performs in connection with military construction in Alaska.

"8. Cost, progress, finance, personnel, and other records, documents and periodic reports, and cost accounting will be continued as at present *in compliance with Engineer Department regulations*, and will be submitted to the Chief of Engineers in accordance with existing procedure.

"9. The Engineer, Alaska Defense Command and designated contracting officers in Alaska *will be governed by the procedure which governs Service Command and Department Engineers.*"

On August 23, 1943 all responsibilities for Alaska construction subject only to the limitations contained in the July 17 instructions were delegated to the C.G., A.D.C. (Ex. 1-H).

As of May 4, 1942 the Officer in Charge, Alaska Construction was appointed by the C.G., W.D.C. as contracting and certifying officer for military construction activities in Alaska with authority to designate other contracting and certifying officers (Ex. 2). This directive was superseded on July 17, 1943, the appointment being conferred upon the Engineer, Alaska Defense Command (Ex. 1-F).

The District Engineer, Seattle, was also appointed "as contracting and certifying officer for all contracts, other than supplies and materials, in connection with military construction activities and real estate leases in Alaska" with authority to designate other contracting and certifying officers (Ex. 1-D).

General G. J. Nold was assigned to duty as Engineer, Alaska Defense Command, September 5, 1941 (Ex. 4-B), reporting for duty October 2, 1941 (Ex. 4-A) and executed Contract 202 in such capacity, being responsible for the administration of the contract in this particular capacity until November 1, 1943.

(b) Authority of Commanding General, Alaska Department, Engineer, Alaska Department, the Contract-

ing Officers and District Engineer, Seattle, in Connection With Execution and Administration of Contracts Subsequent to November 1, 1943.

Pursuant to War Department General Order No. 67 (Ex. 5) the Alaska Department was established as a separate theatre of operations effective November 1, 1943 in the following language:

"1. Alaskan Department. —1. By direction of the President, effective 1 November, 1943, the Alaska Defense Command is redesignated the Alaskan Department * * *.

"2. The Alaskan Department is concurrently separated from the Western Defense Command and established as a separate theatre of operations under the War Department."

The letter of instructions by order of the Secretary of War to the Commanding General, Alaskan Department (Ex. 6) conferred upon the Commanding General, Alaskan Department (hereinafter referred to as C.G., A.D.) the authority previously exercised by the C.G., A.D.C., as follows:

"The delineation of the Command and the mission of the Alaskan Department remains as heretofore for the Alaska Defense Command."

The District Engineer, Seattle, was requested by the C.G., A.D. to continue to perform the same functions as had been performed for the C.G., A.D.C. in accordance with instructions set forth above from the C.G., W.D.C. to the C.G., A.D.C. on April 21, 1942 (Ex. 1-B) as revised on July 17, 1943 (Ex. 1-G):

"2. Effective 1 November 1943, in accordance with General Order No. 67, reference 1c, and under the provisions contained in letter from the Adjutant General, reference 1d, your office is requested to continue for the Commanding General, Alaskan Department, such services as were performed under the jurisdiction of the

Commanding General, Western Defense Command, for the Commanding General, Alaska Defense Command, prior to this date, in connection with military construction in Alaska, *all in accordance with existing instructions from the Chief of Engineers and the Division Engineers, Pacific Division.*" (Ex. 7).

The District Engineer was instructed by the Chief of Engineers to act accordingly (Ex. 8.)

The relationship and functions of the Engineer, Alaskan Department (herein called Engineer, A.D.) and the District Engineer are discussed in memoranda from the Engineer, A.D. to the District Engineer, Seattle, dated October 5, 1944 (Ex. 9) and from the Engineer, A.D., to the Appellee, dated November 25, 1944 (Ex. 56).

Upon the creation of the Alaskan Department, General G. J. Nold, Engineer, A.D., was appointed "Contracting and Certifying Officer for Military Construction Activities and Real Estate Leases in Alaska" with full authority to designate other contracting and certifying officers (Ex. 80-E), having previously served in such capacity as Engineer, A.D.C. (Ex. 4-B). General Nold was replaced as of June 24, 1944 (Ex. 80-K) as such contracting and certifying officer by Col. DeLong (Ex. 80-L) who was in turn replaced by Col. Lang on November 10, 1944 (Ex. 80-N).

For all Contracts here involved Mr. J. I. Noble was "designated as authorized representative of the Contracting Officer with full authority in all things pertaining to the Contract" by General Nold (then Col. Nold). (Ex. 80-D, R. 377).

Numerous other individuals were designated from time to time as contracting officers who originated and signed various of the documents discussed above in the Statement of the Case. See the several designations contained in Ex-

hibits 80 (a) through (p). Also may be noted the following provisions in Contract 202 (Ex. 13):

“Article XIX—Definitions.

“* * *.

“3. Except for the original signing of this contract, and except as otherwise stated here, the term ‘Contracting Officer’ as used herein shall include his duly appointed successor or his authorized representative.”

See likewise in this connection, Army Procurement Regulations, 10 C.F.R. Cum. Supp. § 81.302 (c), page 3331, authorizing the appointment of representatives by any contracting officer.

No. 11985

No. 11984

In The United States Court of Appeals

For the Ninth Circuit

No. 11985

WILLIAM LESLIE KOHL, *Appellant,*

vs.

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a corporation, and MORRISON-KNUDSEN
COMPANY, INC., a corporation, *Appellees,*

UNITED STATES OF AMERICA, *Intervenor.*

No. 11984

ARTHUR J. SESSING, *Appellant,*

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UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT OF
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HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

I.

OBJECTIVES OF PORTAL-TO-PORTAL ACT OF 1947
(29 U.S.C.A. §§251-262)

A large part of appellees' argument in support of the judgment of the District Court may be summarized by the French expression "*c'est la guerre.*" In fact, many District Court opinions applying the

act seem to treat the Portal-to-Portal Act as a sovereign panacea for curing any liability under the Fair Labor Standards Act (29 U.S.C.A. §§201-219) incurred by anyone operating under government contract during the war years. Such was not the intent of Congress.

The intention of Congress in passing the Portal-to-Portal Act of 1947 (29 U.S.C.A. §§251-262) was to relieve employers from liability for acts which, at the time of their commission, could not reasonably have been anticipated to violate the Fair Labor Standards Act, and to give immunity to employers who had honestly been misled into violating the Fair Labor Standards Act by relying upon and complying with, in good faith, orders, rulings, regulations, and so forth, of a government agency.

The Congress was fully aware of the standard provisions of cost-plus-a-fixed-fee contracts let by the Army and Navy during the war. Had the Congress intended to relieve all employers operating under such contracts from liability under the Fair Labor Standards Act, Congress would have chosen apt words to effect that objective.

There is nothing in either the Fair Labor Standards Act or the Portal-to-Portal Act making the fact of war a defense.

II.

**EFFECT OF "DIRECTIVES" AND ORDERS
RECEIVED BY APPELLEES**

The Fair Labor Standards Act, Title 29 U.S.C.A. § 207(a) (3) provides that premium rates of time and one-half for all hours worked in one workweek in excess of 40 are payable to employees engaged in commerce.

"Commerce" is defined by the Act, Title 29 U.S.C.A. §203(b) as:

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Thus, the sole criterion for determining applicability of the Fair Labor Standards Act is whether or not a given employee is engaged in interstate commerce. Certain exceptions are made in the act from the class of employees covered, none of which has been seriously urged concerning these appellants.

The prime contract, Exhibit 13, Circular Letter 2236, Exhibit 14, and the Abersold Directive, Exhibit 16, all relate to wage policies for all contractors on all projects. Each of these exhibits divided appellees' employees into certain groups based on wage brackets. Group B, to which appellants belonged, was defined as follows:

"Group 'B'. Employees whose base salaries are between \$50.00 and \$90.00 per week, inclusive, except those included in Groups 'D' and 'E'.

Overtime provisions with respect to such a classi-

fication have no relation at all to the Fair Labor Standards Act and its requirements. The applicability of the Fair Labor Standards Act depends solely on what a given employee actually does.

Appellees assert that their submission of data to the Army Wage Administration Agency, Exhibit 42, elicited further approval by the War Department of appellees' policies with respect to the payment of overtime. Since the amount of wages due an employee has nothing to do with whether or not he is entitled to overtime compensation, the blanket approval of overtime policies with reference to Group B employees is immaterial to these cases. We must look to the activities of the employees for guidance.

The only data ever submitted to the War Department while these appellants were employed by the appellees were the job descriptions which formed a part of Exhibit 42. During most of his tenure of employment with appellees, the appellant Kohl was classified as an assistant accountant. His job was described in Exhibit 42 as follows:

“Under the direction of the accountant, supervises one or more of the functions of the accounting department.”

The appellant Sessing was classified as a timekeeper. His job was described in Exhibit 42 as follows:

“Keeps and maintains time records of contractor's employees, and prepares preliminary reports therefrom and certifies same to superior.”

A comparison between these job descriptions and the actual work performed by appellants as set forth in the record of these cases in appeals numbered

11464 and 11465 and pages 3-5 of appellants' brief in the former appeals, numbered 11464 and 11465, in which appellants appear as appellees, will readily show the gross inadequacy of these job descriptions for any use whatever in determining applicability of the Fair Labor Standards Act.

The job descriptions submitted in Exhibit 42 were completely adequate for the purpose for which they were submitted, namely, wage stabilization, but from the entire submission, Exhibit 42, no one could possibly form an intelligent opinion one way or the other as to applicability of the Fair Labor Standards Act, and no one purported to do so.

Moreover, the submission for wage stabilization purposes (Exhibit 42) was a combined submission made by the appellee Guy F. Atkinson Company on behalf of all cost-plus-a-fixed-fee contractors in this area and the job descriptions were so compiled as to apply to all projects. As a matter of fact, the record in the first trial of these cases shows without contradiction that there were important differences in procedure and duties of employees of the same classification on the different projects themselves. (R. 11463, pp. 508-509, 516-517, 518-520) In some instances the difference in duties between projects might make the difference between an employee's being in interstate commerce or not.

Appellees reply upon Exhibit 16, the Abersold Directive in response to Exhibit 42, as being an approval or a ruling on their overtime policies with reference to these employees. Yet there were no facts submitted which would or could disclose to anyone the possibility

that the Fair Labor Standards Act applied to part of appellees' employees.

Recognizing that the prime contract (Exhibit 13) and Circular Letter 2236 (Exhibit 14) could not answer problems concerning the Fair Labor Standards Act, the War Department in Exhibit 21 invited the contractors to submit these problems to the proper civilian agencies through the War Department. Paragraph 2.a. stated:

“If a ruling is required from a civilian agency it will be obtained by or through the War Department.”

The appellees never took the slightest advantage of this offer, and the evidence shows without contradiction that appellees never asked the War Department or anyone else whether or not the Fair Labor Standards Act applied to their employees.

The organization charts and wage schedules prepared and submitted to the War Department by appellees contained no information even relevant to the problem. These submissions were made solely for purposes of wage stabilization and to secure to appellees an adequate non-manual working force without violating wage stabilization policies.

The appellees set out in their brief (pp. 16-17) a letter from Mr. Walling, the Wage and Hour Administrator (Exhibit 55). The letter states upon its face that the party whose inquiry it answers did not claim to be within the coverage of the Fair Labor Standards Act and that the nature of the project upon which he was employed was not disclosed in the inquiry. There was nothing from which anyone

could determine whether the Fair Labor Standards Act applied or not.

These appellants have never and do not now assert that the War Department, the Corps of Engineers and the War Department Wage Administration Agency are not agencies of the United States or that the acts of the contracting officers were not duly authorized.

These appellants do most earnestly contend that not one document in evidence in these cases constitutes an administrative regulation, order, ruling, approval or interpretation of an agency of the United States. All are exactly what they purport to be: instructions of one contracting party to another.

Appellees rely heavily upon the case of *Kam Koon Wan v. E. E. Black, Ltd.*, 75 F. Supp. 553. The facts of that case are so peculiar as to yield no precedent for decision outside the Territory of Hawaii and the court implies that the result would be the same without the Portal-to-Portal Act. In the *Kam Koon Wan* case the military authorities had completely supplanted civilian authority for all purposes. The Hawaiian Islands were under military government. The court describes the situation in this way:

“* * * It is a matter of common knowledge in Hawaii that during the days of military government one disregarded a military order or policy—even at one time unknown and unpublished ones—upon the peril of being summarily brought before a provost court, whose high record of rapid-fire convictions made punishment, often irrespective of guilt and the laws of the United States or of the Territory, a foreseeable certainty. The situation was one of military dictatorship and one did as ordered to do. * * * The Constitu-

tion and federal and territorial law was cast aside, and the defendant and all other persons in Hawaii were told by military order what to do and theirs was not to question or to reason why. There was no freedom of choice open to the defendant, and therefore this is not an instance of electing to rely upon the more favorable of conflicting rulings.” (p. 560)

“* * * The important fact is that the defendant presumably would have complied with the Act if it could have and did so as soon as it could, but until the military orders allowed, compliance was impossible. * * * This is not an instance of an employer electing to follow a civil order, rule or regulation issued by an officer of the government. Rather it is an instance, which would not happen in a State, of a military officer of our government, with the full support of the Secretary of War, under arms dictating to employers within the area where he had taken unto himself all power in the guise of a Military Governor that they follow his policy relative to hours and wages—not that of Congress—or else! It, therefore, seems to me to present a far stronger defense than that which Congress had indicated it was willing to recognize and to be within the aim and spirit of §9 of the Portal-to-Portal Act.” (p. 561)

Curtis v. McWilliams Dredging Co., (City Court of N. Y.) 78 N.Y.S. (2d) 317, is also relied upon by appellees as holding that Circular Letter 2236 (Exhibit 14), is a ruling of an agency of the United States. This case also held §9 of the Portal-to-Portal Act unconstitutional. We do not understand appellees to

follow the City Court of N. Y., on the latter point. However, certain facts were shown by the evidence in the *Curtis* case that merit attention. Prior to the issuance of Circular Letter 2236 (Exhibit 14), in our cases, these events had transpired:

“* * * Thereupon the defendants wrote for instructions in a letter prepared for them by their attorneys. They stated ‘* * * we draw to your attention that in recent months the United States Department of Labor, Wage & Hour Division, under whose jurisdiction comes the administration of the Fair Labor Standards Act, * * * has issued interpretative bulletins bearing upon overtime in the contracting industry. We are advised that such interpretative bulletins very clearly state that in the opinion of the Wage and Hour Division, many of our personnel who from time to time work overtime are covered by the provisions of the Federal Wage and Hour Law. If that is so, such of our personnel so covered would be entitled to time-and-a-half for overtime.’

“The response, November 7, 1941, was as follows: ‘You are advised that no compensation will be allowed for such overtime work either in the form of an equal amount of time off with pay or in the form of extra pay for extra hours of duty.’” (p. 323)

The court then goes on to detail a course of dealing between War Department and contractor similar to that in our cases with one notable exception. No mention is made of anything comparable to our Exhibit 21, the letter offering to apply for rulings from civilian agencies on behalf of contractors having problems concerning the Fair Labor Standards Act. In

answer to the plaintive query, "What were the defendants to do?" we must, in our cases answer, "Do what the War Department requested you to do. Ask for a ruling from the appropriate agency, and the Department will get it for you."

III.

REQUIREMENTS FOR A DEFENSE UNDER §§9 AND 11 OF THE PORTAL-TO-PORTAL PAY ACT OF 1947 (29 U.S.C.A. §§258 AND 260)

The sections upon which appellees rely for a defense to these actions are fully set forth in Appendix A. The pertinent portions of these sections provide:

"§258. Reliance on past administrative rulings, etc.

"In any action or proceeding, * * * based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay * * * overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States * * *."

"§260. Liquidated damages

"* * * If the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (b) of this title."

The act or omission complained of is the failure of appellees to pay overtime to these appellants as required by the Fair Labor Standards Act. The question is: Was this failure in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation of any agency of the United States?

Appellees concede that none of the documents upon which they rely related to the Fair Labor Standards Act, but they argue, such reference is not necessary.

Appellants agree that no reference to the Fair Labor Standards Act *eo nomine* is required, but it is clear that the regulation, ruling, order, approval or interpretation must relate to the act or omission complained of and must be based upon data from which an intelligent opinion could be formed.

There was no reason why overtime should have been paid to Group B employees in general, and in the light of the job descriptions submitted for wage stabilization purposes. There was every reason why overtime should have been paid to these appellants in the light of what they actually did.

The act or omission complained of is not violation of the Wage Stabilization Act, but violation of the Fair Labor Standards Act, and the criteria for compliance with the two acts are totally different.

IV.

THE WAR DEPARTMENT AS A CONTRACTING PARTY

As pointed out in our opening brief, the War Department, in the transactions giving rise to these

cases, acted not in an administrative capacity, but in an executive capacity as a contracting party. *Jackson v. N. W. Airlines*, 76 F. Supp. 121. While there is no question but that a government department can act in both capacities, here the War Department did not purport to do so.

In the instant case, when the appellees asked if they should pay overtime under certain contracts, (not to certain types of employees doing certain things) Exhibit 74, the contracting officer replied that overtime was payable only if the Fair Labor Standards Act applied and he didn't know whether it did or not, Exhibit 75. There the matter ended.

The War Department itself did not consider its "directives" administrative regulations, orders, rulings, approvals or interpretations with respect to overtime payment under the Fair Labor Standards Act since it offered to procure rulings on the question from the appropriate agency (Exhibit 21).

V.

GOOD FAITH

Appellees invoke Rule 52(a) of the Federal Rules of Civil Procedure as barring reconsideration by this court of the issue of whether or not appellees' asserted reliance upon the various documents in evidence here was in "good faith." The pertinent portion of Rule 52(a) reads:

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *"

For some years after the adoption of the Federal

Rules of Civil Procedure it was uncertain whether this portion of Rule 52(a) followed the former law or equity rule. Such doubts have at last been set at rest by the Supreme Court in *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L. ed. 552, wherein the Supreme Court states that Rule 52(a) makes the old equity rule applicable and discusses the effect of the rule as follows:

“In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. * * * It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where ‘clearly erroneous.’ The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” (pp. 394-395)

In the case at bar there was no dispute in the evidence and hence no question of credibility of witnesses before the trial court.

Whether or not appellees acted in good faith is undoubtedly a question of fact, but what constitutes good faith is a conclusion to be drawn from all the circumstances. In *Divins v. Hazeltine Electronics Corp.* (D.C.S.D., N.Y.) 79 F. Supp. 513, the District Court observed:

“Good faith cannot be established as a simple fact, such as the signature to a document. It is an ultimate fact—a conclusion to be drawn from all the circumstances.” (p. 514)

This statement was reiterated by the United States District Court for the Western District of Pennsylvania in *Burke v. Mesta Machine Co.*, 79 F. Supp. 588 at page 611, where that court further explains:

“The test of good faith is an objective one, and not the actual state of mind of the employer.” (p. 611)

In *Hoffman v. Todd & Brown* (U.S.D.C., N.D., Ind. S.B. Div.) 15 Labor Cases §64,856, the court quotes and follows the following rule from the *Burke* case *supra*:

“The defense of ‘good faith’ is intended to apply only where an employer innocently and to his detriment followed the advice as it was laid down to him by governmental agencies without notice that such interpretations were claimed to be erroneous or invalid.”

Neither the *Burke* or the *Hoffman* case was before the trial court in these cases.

The evidence on the question of good faith has been fully discussed in our opening brief, but it may not be amiss to review it briefly.

On June 28, 1943, the Corps of Engineers advised

appellees that problems concerning the Fair Labor Standards Act should be submitted through the War Department which, in turn, would obtain rulings from the appropriate agency upon request (Exhibit 21).

On March 21, 1944, Procurement Regulations 9 and 11 were published in the Federal Register at pages 2989 and 2992 (Exhibit 81), respectively, advising all the world that the War and Navy Departments and Wage and Hour Division disagreed on the applicability of the Fair Labor Standards Act, and had agreed upon procedures for handling claims under the act, and assuring contractors of *reimbursement* for amounts paid in settlement of such claims. Appellees had not only constructive, but actual notice of this dispute and these procurement regulations (R. 288, 354-355).

On April 13, 1944, in response to appellees' letter, Exhibit 74, Major George F. Tait, Corps of Engineers Contracting Officer, transmitted to appellees the letter marked Exhibit 75, the pertinent portions of which were quoted in our opening brief at pages 11 and 12, and which is quoted in full in the brief of appellees at pages 8 to 9. In this letter the War Department, through its authorized agent, advised the appellees that overtime was payable to Group B employees only if the Fair Labor Standards Act was applicable, that the War Department and the Wage and Hour Division did not agree on the applicability of the Act to these employees, and in paragraph two of the letter the contracting officer makes the following interesting statement: "The Act exempts supervisory em-

ployees but nothing is said about semi-supervisory employees, so the debate is still unsettled." Thus the only inference that can be drawn from Exhibit 75 is that the Fair Labor Standards Act was considered applicable to appellees' operations by both the Wage and Hour Division and the War Department but that the War Department believed all Group B employees to be exempt on the ground that these employees were either executive or administrative, although the War Department frankly advises appellees that the Wage and Hour Division does not share this view.

At the time this letter, Exhibit 75, was received by appellees, regulations of the Wage and Hour Administrator were in effect covering the disputed point. Sections 541.1 and 541.2 of Title 29 C.F.R., promulgated October 12, 1940, 5 F.R. 4077, specifically defined executive and administrative employees within the meaning of the exemption in the Fair Labor Standards Act. This fact brings the instant case squarely within the following language of the case of *Hoffman v. Todd & Brown, supra*, in which the United States District Court for the Northern District of Indiana, South Bend Division stated:

"In its memorandum the defendant says that 'all matters concerning employee and labor relations were controlled through the Labor Section of the office of the Chief of Ordinance' and 'throughout the entire period for which overtime is claimed in this action, each and all of the plaintiffs were paid compensation fixed and determined by the rulings, approval and authority granted by the War Department.' Even though these assertions be true, the defendant cannot utilize them as a basis for a defense under Sec-

tion 9 of the Portal-to-Portal Act of 1947. Section 9 relieves the employer of liability if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation of any agency of the United States. Regulations 541.1 and 541.2 of the Wage and Hour Division are the administrative regulations which were applicable in this instance. The defendant here cannot be found to have acted in good faith conformity with War Department rulings, regardless of their effect, when the Wage and Hour Administrator had spoken previously with clarity and authority."

As soon as problems arose under the wage stabilization program, appellees were zealous in their efforts to assemble data for a ruling from the Wage Stabilization Agency, because, the record shows, (R. 239, 417-418) violation of the wage stabilization orders would have resulted in withholding of current reimbursement for costs.

In spite of the fact that the War Department itself advised appellees that applicability of the Fair Labor Standards Act to their employees was a question shrouded with doubt and confusion, Exhibits 75 and 81, appellees never bothered to request a ruling on the point. Why? Because payment of wages and overtime compensation in accordance with their contract, Exhibit 13, assured them of current reimbursement for costs, and the War Department had promised reimbursement for amounts appellees might pay in later settlement of claims or judgments under the Fair Labor Standards Act (Exhibit 81, R. 271, 475).

Appellees attempt to inject a great deal of uncer-

tainty into the law, where none exists, by suggesting that the applicability of the Fair Labor Standards Act to employees engaged in original construction is a matter of uncertainty. A glance at the record in the first appeals of these cases, Nos. 11464 and 11465, will demonstrate that the appellees here involved never did, or claimed to do, any construction work of any kind. No one has contended that the pounding of nails or the pouring of concrete for original construction brings employees performing those tasks within the Fair Labor Standards Act. The case of *Murphey v. Reed*, U.S., 93 L. ed., Adv. O. 91, 17 L.W. 4017, was appealed from the Circuit Court of Appeals for the Fifth Circuit, 168 F.(2d) 257, and was remanded to the District Court on the same basis that the case of *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S. Ct. 1031, 92 L. ed. 989, was sent back; namely, that the records in these two cases were so inadequate that no appellate court could decide the issues involved. The Circuit Court of Appeals in the *Murphey* case said:

“We have dredged up from the record, which is in many respects vague and uncertain, the important and material facts upon which the decision must turn.” (168 F.(2d) 259)

The Supreme Court apparently did not feel that there were sufficient facts in the record to warrant dredging. It is true that the Supreme Court ordered dismissal of the cases involving construction employees, but the record was inadequate to determine that there was any basis for coverage. Such a decision in the present state of that case cannot be considered authority for anything. In any event, the record in

the instant case is clear that appellees were at no time confused on this point.

CONCLUSION

In the final analysis these cases present this situation: The appellees at all times knew that the War Department and the Wage and Hour Division did not agree on whether or not the Fair Labor Standards Act applied to their operations. The appellees had a contract with the War Department which provided for reimbursement to the appellees weekly of all labor cost. As long as the appellees paid wages and overtime compensation strictly in accordance with the terms of their contract, and as the War Department told them to, they were assured of weekly reimbursement for these costs. If reimbursement was threatened, as when a problem arose under the wage stabilization program, appellees were diligent in their efforts to obtain an authoritative answer. Although the War Department offered to obtain an authoritative ruling for the appellees on the applicability of the Fair Labor Standards Act, there was no reason for appellees to bother to procure such a ruling since they were assured of reimbursement for any judgments which might be taken against them.

On the face of the record, appellees did not act in good faith by innocently and to their detriment following advice laid down to them by a Government agency without notice that such an interpretation was claimed to be erroneous and invalid. *Hoffman v. Todd & Brown, supra*. Appellees here acted neither innocently nor to their detriment, and were at all times on notice that the Wage and Hour Division considered

the War Department's view to be erroneous and invalid. The record is equally clear that appellees never relied on anything other than their contract and assurances of the War Department that they would be reimbursed for liabilities incurred. In view of the correspondence between appellees and the War Department and their actual knowledge of the dispute between the two Government agencies and the offer of the War Department to obtain an authoritative ruling, the appellees had no reasonable grounds for believing that their acts and omissions were not in violation of the Fair Labor Standards Act. Their only inquiry concerning payment of overtime elicited the answer that the War Department did not know.

In view of the foregoing facts, conclusively established by the uncontroverted evidence, appellees have not established defenses under Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947, U.S.C.A. Sections 258 and 260, and the judgment of the trial court should be reversed.

Respectfully submitted,

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Attorneys for Appellants.

APPENDIX A

PERTINENT SECTIONS OF PORTAL-TO-PORTAL PAY ACT OF 1947 TITLE 29 U.S.C.A. §§258 AND 260

“§258. Reliance on past administrative rulings, etc.

In any action or proceeding commenced prior to or on or after May 14, 1947, based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.”

“§260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947, to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or

omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (b) of this title.”

In The United States Court of Appeals For the Ninth Circuit

VERNON O. TYLER,	Appellant,	}	No. 11983
vs.			
S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation,	Appellees.		
WILLIAM LESLIE KOHL,	Appellant,	}	No. 11984
vs.			
S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation,	Appellees.		
ARTHUR J. SESSING,	Appellant,	}	No. 11985
vs.			
S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation,	Appellees.		
H. A. LASSITER and W. R. MORRISON,	Appellants,	}	No. 12017
vs.			
GUY F. ATKINSON COMPANY, a corporation,	Appellee.		
OWEN J. McNALLY,	Appellant,	}	No. 12018
vs.			
S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation,	Appellees.		

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

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FILED

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UPON APPEAL FROM THE UNITED STATES DISTRICT
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HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANTS

These appellants have had an opportunity thoroughly to review the reply brief of the appellants Cole and Sessing filed herein. That brief, in our judgment, is comprehensive in its analysis of the problem involved in this appeal and is conclusive of the issues of our appeal as well as in the case of the appeals docketed in those causes. In the interest,

therefore, of economy of time and for the purpose of preserving a precise definition of the issues herein, with consent of such appellants, we hereby adopt their brief and ask that it be considered and applied to the matters and issues involved in our appeal.

While their brief upon the whole covers for the most part the issuable aspects of our appeal, we deem it worth while to discuss with this court the significance and the connotation of the holding in the Eighth Circuit Court of Appeals in the case of *Day & Zimmerman, Inc. v. Reid*, 168 F.(2d) 356, affirming 73 F. Supp. 892. We do so because we undertake to submit to this court that the pattern, factual content and legal issue in that case are identical with the pattern, factual content and legal issue in our own. Both cases, therefore, are necessarily governed by the same principles of law.

Day & Zimmerman v. Reid

The case came to the Court of Appeals for the Eighth Circuit from the Southern District Court of Iowa, and was decided in the Circuit May 25, 1948. We think the identity of the issuable facts and circumstances between that case and the instant appeal may be presented by submitting the following enumeration of factors appearing therein and by applying them with equal force to the context of the instant appeal. The following facts and circumstances, therefore, will be found to characterize the *Reid* case:

(1) It involved a contract on a cost-plus fixed-fee basis between the defendants (present appellees) and the War Department as a contracting party. The

Ordnance Department was designated by the War Department as a supervising agency.

(2) The contract contained amongst others a classification for an assistant storekeeper characterized as "supervisory employment," purporting to be exempt from the coverage of the Fair Labor Standards Act on the assumption that the duties were supervisory, that is, administrative or executive.

(3) The auditor for the War Department constantly on the job approved payrolls at regular intervals. This was pursuant to the contract providing for supervision of all operations by the Ordnance Department with unlimited power and authority to direct the work in all its phases.

(4) The defendant company was reimbursable under the contract for all expenditures approved by the auditor for the War Department.

(5) Plaintiff, though classified as exempt as assistant storekeeper, spent more than 20% of his time at duties of non-exempt employees. By reason of this fact his employment was coverable under the Fair Labor Standards Act, and actually by reason thereof he lost his status of exemption. (Administrative Regulations, 29 C.F.R. V, Sec 541.1, 541.2.) Hence the trial court in its findings and conclusions awarded him a judgment for overtime, to which it found him entitled under the terms of the Fair Labor Standards Act.

(6) The defendant pleaded under the Portal to Portal Act right to exoneration for such admitted liability in alleging that it acted in "good faith in con-

formity with and reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States," in classifying and paying plaintiff upon the theory that he was exempt.

Before noticing the court's holding and its discussion pursuant thereto, let us now turn to the factual context of the case at bar.

(1) Here too the defendant, a cost-plus fixed-fee contractor, contracted with the War Department as the prime contractor under terms similar, if not identical, to those contained in the *Reid* case (Exhibit 13).

(2) Again here too there was a classification purporting to describe plaintiff's employment as that of a non-manual nature ranging from assistant auditor and auditor (Tyler), senior clerk and timekeeper (Shumate), clerk (Bruner), accountant (Raymond), assistant auditor (Hood), clerk, checker, storekeeper and assistant timekeeper (Forstein), assistant personnel manager (Louis Kin), etc. (R. cause No. 11463, Vol. 1, p. 20-26.) Here too defendant companies assumed the employment so classified was exempt from the Fair Labor Standards Act and this assumption was indulged in even in the face of the knowledge of the terms and provisions of the Fair Labor Standards Act (10 C.F.R. 1944 Supp., Sec. 809.961 (b); see also Comptroller General's decision, Dec. 15, 1943, referred to therein, p. 975; Comptroller General's opinion B-38642). And further in the face of specific information from the War Department that the Wages and Hours Administrator under the Fair Labor Standards Act claimed such em-

ployment subject to the overtime provisions of the Fair Labor Standards Act and was within the jurisdiction of the Wages and Hours Division (see the so-called "*Tait*" letter, Ex. 75, set out in full in our opening brief, p. 20, 21, 22, 23, 24; also reference thereto, Cole and Sessing brief, p. 15, 16).

(3) Here too inspectors for the War Department were constantly on the job, inspected every operation, audited and approved every payroll at regular intervals. This fact appears abundantly throughout the entire record, is undisputed and admitted by all parties (See, for example, R. p. 379).

(4) Here again the representatives and auditors for the War Department and the Corps of Engineers approved all expenditures for reimbursement (R. 269, 270).

(5) Here too the plaintiffs were classified in the original employment contract arrived at prior to their actual employment under job descriptions assuming them to be exempt from the Fair Labor Standards Act. Subsequent to their employment on the job site they were assigned to work and they performed duties other and different from those contained in their job classifications, which duties brought them squarely within the coverage of the overtime provisions of the Fair Labor Standards Act. (See conclusion of law of the court below in cause No. 11643, R. Vol. 1, p. 64, 65; also see *Lassiter v. Guy F. Atkinson Co.*, 162 F.(2d) 774, CCA 1947.)

(6) Subsequent to the judgment of the trial court below in plaintiff's favor, and while the defendants'

appeal in this matter was pending in this Circuit, and subsequent to the argument in this court upon the merits thereof, the defendants, pursuant to the then recently enacted Portal to Portal Act of 1947, likewise lodged the defense that it should be exonerated from the liability established by the trial court's judgment upon the ground that they had acted "in good faith in conformity with and in reliance upon an administrative order, ruling, approval or interpretation of an agency of the United States" in classifying and paying these plaintiffs without regard to and in violation of the Fair Labor Standards Act.

Upon such issues, identical in the two cases, it is interesting to note the disposition thereof by the Eighth Circuit in its decision in the *Reid* case. There that court recognized the distinction between an abstract job classification antecedent to hiring and a job classification subsequent thereto predicated upon duties actually performed. Approval of an antecedent job description by the War Department could not be, the court held, in reliance in good faith or otherwise upon any assurance that the performance of other and different duties than those called for in the job description would be exempt from coverage under the Fair Labor Standards Act. In the absence of any knowledge by the War Department or its agencies of the duties actually performed by the plaintiffs, no approval of a prior job classification could amount to a reliance upon an "administrative order, regulation, ruling, approval or interpretation of an agency of the United States." In order for it to do so, the court clearly said that the approving agency

must necessarily have knowledge of the duties actually performed.

“It was the intent of the Portal to Portal Act that employees who had an understanding in good faith with an appropriate Government agency that a practice or act was proper under the Fair Labor Standards Act should not be held liable for a violation of the latter act. It certainly was not the intent of the Portal to Portal Act that a mere approval for payment of a payroll submitted to the Government auditors for that purpose should constitute an understanding in good faith between an agency of the Government and the party submitting the payroll that one individual erroneous classification among thousands on that payroll was a proper classification when it was not even shown that any official of the Government knew what the individual erroneously classified was actually doing, and the employer even professes ignorance of the employee’s activity.”

This consideration obtains with peculiar force in the instant case. *The companies here never submitted to the War Department or any other agency of the Government a statement or description of the duties actually performed by these plaintiffs.* The duties thus performed were established by the evidence and by the judgment of the court below to be at variance with the non-manual supervisory and exempt classifications in the original contract. Both the contractor and the representatives of the War Department ignored the duties actually performed and limited themselves to considering the abstract job classifications in the contract prior to the initiation of any employment. Note the record. Mr. Northcutt testified: (R. 267)

"Q Did you at any time after employment of any of these plaintiffs submit a job description of the tasks or duties performed by any of these plaintiffs to any representative or official of any agency of the United States for the purpose of determining whether they were or were not included or covered under the terms of the Fair Labor Standards Act?

"A No, sir."

Mr. Noble, the contracting officer, testified: (R. 412)

"Q During the life and progress of the construction and contract 7100 and 202, you were never called on, were you, to investigate or determine the particular tasks or duties performed by any of the plaintiffs in this case,—not to be performed, but actually performed, I mean?

"A Was I ever called upon to?

"Q Yes.

"A No."

It is clear in this case, as was true in the *Reid* case, that the War Department never concerned itself with the nature of any of the duties actually performed by any given individual. It limited itself particularly to considering abstract job descriptions theoretically approved long prior to the initiation of any of the construction projects. Note again the record:

"Q Mr. Northcutt, at the time the job descriptions as contained in Exhibit 42 were prepared, what basis did you have for the preparation of such job descriptions?

"A The basis for the preparation of the job descriptions—Pearl—was data already accumulated by the War Department from various sources.

“The Court: In what form, if you know?”

“The witness: In the form of mimeographed bulletins and from compilations prepared by each of the interested cost-plus fixed-fee contractors of the War Department in the Aleutians.”

It is clear, therefore, that there is no relationship between the original job classification under which each of these appellants was employed, and the duties actually performed by each of these appellants subsequently on the job site. *That which determined liability under the Fair Labor Standards Act was the nature of the duty actually performed.* An abstract or theoretical description in an antecedent classification or job description has nothing whatsoever to do with liability for overtime under the Fair Labor Standards Act. Hence, it is too clear for argument that neither reliance nor good faith upon such abstract job descriptions can measure up to the conditions required under the Portal to Portal Act to exonerate an employer for failure to comply with the Fair Labor Standards Act.

The Portal to Portal Act requires reliance in good faith upon a regulation or ruling of an agency of the Government. It requires a reliance with respect to an “act” violative of the Fair Labor Standards Act, or an “omission” to comply with the Fair Labor Standards Act. The violation or the failure to comply must be predicated upon a ruling of an agency which leads the employer in good faith to believe that the Act does not affect him. Obviously no agency of the United States Government can furnish any assurance to any employer that the Act does not apply

to any given employment unless or until that agency has knowledge of the nature of the employment in question. It is precisely the *nature of the duty actually performed* which determines the applicability or the non-applicability of the Fair Labor Standards Act. Any ruling by an agency in the absence of such knowledge is not such a ruling as is contemplated in Sec. 9 of the Act. Certainly without submitting to any agency the data with respect to the nature of the duties performed so that such agency may pass upon coverage or non-coverage of the Act, no employer can undertake to claim either reliance or good faith. It is to be borne in mind that the Portal to Portal Act does not exonerate an employer, merely for *conformity* alone. It must be more than conformity. It must be conformity *in reliance* with respect to an act or omission and it must be more than conformity and reliance with respect to an act or omission; there must be *good faith*. The reasoning and the holding of the Eighth Circuit in the *Reid* case, therefore, we submit, dispels any argument or assumption of good faith or reliance by the appellees in this case.

CONCLUSION

The defendant companies (appellees here) failed to pay these plaintiff appellants such amounts for overtime as are provided for in the Fair Labor Standards Act. By the simple mechanism of classifying appellants as supervisory, non-manual and exempt, anterior to their employment, appellee companies thereafter proceeded upon the assumption that they would remain exempt regardless of the nature of the duties assigned and actually performed in the course of the employment. By the very fact and by the nature of these work assignments and of the duties performed, appellants became entitled to the coverage of the Fair Labor Standards Act and the overtime payments therein provided. By reason of that fact the trial court below awarded them a judgment. Is that judgment to be set aside, and is the liability of these appellee companies to be exonerated by reason of the special plea and defense afforded them by the Portal-to-Portal Act? That act did not repeal the right of these appellants to earn and receive overtime under the Fair Labor Standards Act. It merely granted the appellee companies an exemption if, by the requisite burden, it could establish reliance with respect to its violation of the Fair Labor Standards Act—with respect to its “act or omission”—in good faith upon a ruling, order or regulation of an agency of the United States. The law did not express a preference or a presumption in favor of exoneration of liability. In fact, it named a series of four conditions which must concurrently be present as a prerequisite to such exoneration.

The company's proof established that it conformed to a contract which it had with the War Department. It did not rely upon an assurance by the War Department that its refusal to pay in accordance with the Fair Labor Standards Act was not an act or omission violative of that act. In fact, it never asked the War Department to determine whether its refusal to pay was or was not in accordance with the Fair Labor Standards Act. It never submitted to the War Department or any other agency a description or enumeration of the duties performed by these appellants. It neglected to take any steps to determine its liability to these appellants under the Fair Labor Standards Act even in the face of definite knowledge communicated to it by the War Department that the Wages and Hours Division administering the Fair Labor Standards Act claimed that act to be applicable to the appellees' business and to the employment in which these appellants were engaged. The appellee companies were not interested in a ruling upon this issue by any agency of the United States, and were totally indifferent as to whether the Fair Labor Standards Act did or did not apply—and well they might be, because, as the War Department advised them, in the event it should develop that the act applied and that these appellees were liable, they were and would be reimbursable to the full extent of such liability. The actual reliance in this case, therefore, upon which appellee companies acted was that of indemnification. At no time did they, as reasonably prudent business men, have any justification for feeling that the Act itself did not apply or that they were

free from its coverage. Neither the reliance nor the good faith contemplated in the Portal-to-Portal Act, therefore, can be predicated on conduct so neutral, indifferent or equivocal. Appellee companies elected to abide the risk involved in their indifference. They must and they should now assume that risk. Under such circumstances Congress never intended the Portal-to-Portal Act to serve as an escape from liability.

Respectfully submitted,

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11983, 11984, 11985, 12017, 12018

**In the United States Court of Appeals
for the Ninth Circuit**

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THE UNITED STATES OF AMERICA, INTERVENOR

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES AS INTERVENOR

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CONSTITUTION AND STATUTES

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**In the United States Court of Appeals for the
for the Ninth Circuit**

No. 11983

VERNON O. TYLER, APPELLANT

v.

S. BIRCH & SONS CONSTRUCTION COMPANY, A CORPORATION,
AND MORRISON-KNUDSEN COMPANY, INC., A
CORPORATION, APPELLEES

No. 11984

WILLIAM LESLIE KOHL, APPELLANT

v.

S. BIRCH & SONS CONSTRUCTION COMPANY, A CORPORATION,
AND MORRISON-KNUDSEN COMPANY, INC., A
CORPORATION, APPELLEES

No. 11985

ARTHUR J. SESSING, APPELLANT

v.

S. BIRCH & SONS CONSTRUCTION COMPANY, A CORPORATION,
AND MORRISON-KNUDSEN COMPANY, INC., A
CORPORATION, APPELLEES

No. 12017

H. A. LASSITER AND W. R. MORRISON, APPELLANTS

v.

GUY F. ATKINSON COMPANY, A CORPORATION, APPELLEE

No. 12018

OWEN J. McNALLY, APPELLANT

v.

S. BIRCH & SONS CONSTRUCTION COMPANY, A CORPORATION,
AND MORRISON-KNUDSEN COMPANY, INC., A CORPORATION, APPELLEES

THE UNITED STATES OF AMERICA, INTERVENOR

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION*

BRIEF OF THE UNITED STATES AS INTERVENOR

STATEMENT**(a) The nature of the cases and interest of the United States
as Intervenor**

The Appellants in the above actions are or were employees of Appellees and sued for overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938. The instant appeals have been taken from the judgments of the District Court wherein the actions were dismissed, on the ground that Appellees had pleaded and proved defenses under Sections 9 and 11 of the Portal-to-Portal Act of 1947.

Pursuant to the Act of August 24, 1937, c. 754, § 1, 50 Stat. 751, 28 U. S. C. § 2403, the United States intervened in the cases in support of the constitutionality of the Portal Act. In view of the limited nature of the intervention, the Government in these cases, as in others, takes no position as to any issues

relating to the factual applicability of the Act beyond discussing the meaning of its sections to the extent deemed relevant to the constitutional questions. While this brief deals primarily with the arguments that have been advanced by Appellants in these cases, it is not confined to such arguments but covers as well all respectable arguments that have thus far come to our attention in connection with litigation involving attacks upon the constitutionality of the Portal Act throughout the country. Accordingly, a mere reference to a contention that the Act is unconstitutional will not necessarily imply that the present Appellants have advanced or rely upon it.

(b) The statutes involved

Pertinent excerpts from the Portal-to-Portal Act of 1947 (Act of May 14, 1947, Ch. 52, 61 Stat. 84, 29 U. S. C. § 251-262) and the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Ch. 676, 52 Stat. 1060; as amended, 29 U. S. C., § 201-219) appear at appropriate points in the brief, *infra*.

(c) Court decisions under the Portal-to-Portal Act of 1947

The constitutionality of the Act has been upheld by six United States Courts of Appeals¹ and by more

¹ *Rogers Cartage Co. v. Reynolds*, 166 F. (2d), 317 (C. A. 6); *Seese v. Bethlehem Steel Co.*, 168 F. (2d) 58 (C. A. 4); *Battaglia v. General Motors Corporation*, 169 F. (2d) 254 (C. A. 2); *Darr v. Mutual Life Insurance Company*, 169 F. (2d) 262 (C. A. 2); *Fisch v. General Motors Corporation*, 169 F. (2d) 266 (C. A. 6); *Role v. J. Neils Lumber Company*, 171 F. (2d) 706 (C. A. 9); *Lee v. Hercules Powder Company*, 16 Labor Cases, par. 64,920, 8 WH Cases 486 (C. A. 7); *McDaniel v. Brown & Root, Inc.*, 16 Labor Cases, par. 64,932, 8 WH Cases 487 (C. A. 10); *Potter v. Kaiser Co.*, 171 F. (2d) 705 (C. A. 9).

than a hundred decisions of Federal District Courts.² with possibly two exceptions,³ we are aware of no decisions to the contrary. The Supreme Court has denied petitions for certiorari in the following cases: *Battaglia v. General Motors Corporation*, 335 U. S. 887; *Darr v. Mutual Life Insurance Company of New York*, 335 U. S. 871; *Cingrigrani v. B. H. Hubbert & Son, Inc.*, 335 U. S. 868; *Fisch v. General Motors Corporation*, 335 U. S. 902.⁴

ARGUMENT

The portions of the Portal-to-Portal Act affecting monetary claims in existence at the time of its enactment are constitutional notwithstanding their substantive validity under earlier legislation

The portions of the Portal-to-Portal Act affecting existing claims under the Fair Labor Standards Act are Sections 2, 3, 6, 8, 9, 11, and 12. The sections under attack in the instant cases are Sections 9 and 11. Since most of the arguments and authorities relating to the so-called "retroactive" changes made in the substantive law by these sections are applicable to each of them, all contentions advanced under this point in the brief are intended to apply equally to Sections 9 and 11, except where a contrary intention plainly appears.

² The reported District Court decisions are listed in the Appendix, *infra*.

³ *Sveltik v. Vultee Aircraft Corp.* (D. C., N. Tex.), 7 WH Cases 282, 13 Labor Cases, par. 64,063; *Curtis v. McWilliams Dredging Co.* (N. Y. City Ct.), 14 Labor Cases, par. 64,352, 7 WH Cases 757.

⁴ The following two cases were remanded by the Supreme Court for reconsideration because of the enactment of the Portal Act: *Alaska Juneau Gold Mining Co. v. Robertson*, 331 U. S. 793; *Madison Ave. Corp. v. Asselta*, 331 U. S. 795.

1. The applicable provisions of the Portal-to-Portal Act are limited in operation to purely statutory claims

In view of the extravagant contentions as to the destructive effect of the Portal-to-Portal Act upon the rights of employees which have been advanced by those attacking the constitutionality of the Act, it seems well at the outset to examine briefly the nature of the claims affected by the legislation.

Section 6 of the Fair Labor Standards Act (29 U. S. C. § 206) requires every employer to pay to each of his employees who is engaged in commerce or in the production of goods for commerce not less than certain minimum wages. Section 7 of that Act (*id.*, § 207) provides in part as follows:

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * [for a workweek longer than 44, 42 or 40 hours as the case may be] * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

For violations of the Act in respect of its minimum wage and overtime compensation provisions, Section 16 (*id.*, § 216), in addition to criminal penalties, made employers civilly liable to employees as follows:

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall

be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages.

It is clear that, insofar as claims arising under the Fair Labor Standards Act are concerned, Sections 2, 9, and 11 of the Portal-to-Portal Act of 1947 were addressed exclusively to claims which came into being solely as a consequence of the enactment of Section 16 of the Fair Labor Standards Act.

Section 2 of the Act is, in relevant part, as follows:

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in

effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, * * * in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

Sections 9 and 11 of the Portal-to-Portal Act are as follows:

SEC. 9. *Reliance on Past Administrative Rulings, Etc.*—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

* * * * *

SEC. 11. *Liquidated Damages.*—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to

such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 (b) of such Act.

Sections 2, 9, and 11 plainly refer to liability arising “*under the Fair Labor Standards Act of 1938, as amended.*” [Italics supplied.]

It will be observed that Congress does not attempt in any way to interfere with the enforcement of claims other than those sought to be asserted *under* its prior legislation. Its provision is that “no employer shall be subject to any liability * * * *under the Fair Labor Standards Act of 1938, as amended*” [italics supplied]. Therefore, any claim which can be asserted independently of the prior legislation is, to that extent, not affected by the Act. Moreover, claims based upon activities which were compensable under express provisions of written or unwritten contracts, or by custom or practice, continue to be enforceable *under* Section 2 of the Act. Accordingly, there can be no merit to any contention that the Portal-to-Portal Act is unconstitutional because the claims that it purports to bar are contract claims.

That Sections 2, 9, and 11 were intended to affect only purely statutory claims is made evident not only by their language but by reference to the Congressional findings and policy in Section 1, in part, as follows:

The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the result that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, * * *

(4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; * * *.

By Section 2 of the Act, the Congress relieved employers of liability on claims asserted “*under the Fair Labor Standards Act*” [italics supplied], unless based upon activities which were *compensable* under either contract or custom. In other words, the Congress was willing to decide, as a matter of legislative policy, that the liabilities affected by Section 2 of the Act were unexpected, since the activities themselves had never been regarded as compensable; but obviously it was unable to make that decision as to claims affected by Sections 9 and 11. Instead, the Congress there placed upon the employer the burden of proving to the court that his violation “was in good faith in conformity with and in reliance on” a ruling of an agency of the United States. Cf. *Anderson v. Mt. Clemens Pottery Co.* (D. C. E. D., Mich., 1947), 69 F. Supp. 710, 712, 719–721. In both cases, however, it is clear that it was the intention of the Congress

to relieve employers of "unexpected liabilities" arising retroactively, in effect, as a consequence of subsequent interpretations of Congressional legislation.

In other words, if any such claim rests sufficiently upon contract that it may be enforced independently of the Fair Labor Standards Act, its enforcement in that manner is in no way barred by the Portal-to-Portal Act. However, it is clear that employers are relieved of liability on claims, which rest upon prior legislation, coming within the coverage of such sections unless the Congress, for some reason, lacks constitutional power to withdraw the support of earlier legislation.

2. The Portal-to-Portal Act is constitutional as an exercise of the plenary power of the Congress to withdraw and modify rights conferred exclusively by its prior legislation

As indicated above, by the Portal-to-Portal Act the Congress has not sought to disturb any claim to any extent that it does not rest exclusively upon its prior legislation in the sense that it would be valid apart from such legislation. In other words, any claim based upon contract, to the extent that it can be enforced in a contract action without reliance upon the Fair Labor Standards Act, can be enforced in such an action notwithstanding the provisions of Sections 2, 9, and 11 of the Portal-to-Portal Act. The Congress has found that the Fair Labor Standards Act has been interpreted so as to create unexpected liabilities under which employees would receive "windfall payments * * * for activities performed by them without any expectation of reward

beyond that included in their agreed rates of pay.” (Sec. 1.) These are the claims that the Congress obviously intended to reach and to bar by the Act. As to employees such uncontracted for benefits were purely statutory⁵ and can be likened to statutory gratuities. As to employers such unexpected liabilities can be likened to statutory penalties.⁶

Of course, the Congress may terminate statutory gratuities and penalties at any time. The mere repeal of a statute providing for penalties, without a saving clause, terminates prior liability thereunder. *Norris v. Crocker*, 13 How. 429, 440. See also *United States v. Chambers*, 291 U. S. 217, 222–226 (and authorities there cited). And, in absence of contractual obligation, statutory gratuities may be withdrawn at any time at the will of the Congress. See and cf. *Norris*

⁵ See, e. g., *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590, 602–603; *Jewell Ridge Corporation v. United Mine Workers*, 325 U. S. 161, 167; *Brooklyn Bank v. O’Neil*, 324 U. S. 697, 704.

⁶ The civil liabilities to employees imposed by the Fair Labor Standards Act upon “Any employer who violates” its provisions (29 U. S. C. § 216 (b) had two distinct, if integrated, purposes, i. e., (1) to enforce its provisions relative to minimum wages and maximum hours (*id.* §§ 206 and 207) and (2) to provide for the payment of fair compensation to employees. Accordingly, while the benefits conferred upon employees are personal to them, they are nonetheless enforcement provisions of the Act which could not be contracted away. See and cf., e. g., *Overnight Motor Co. v. Missel*, 316 U. S. 572; *Brooklyn Bank v. O’Neil*, 324 U. S. 697. Inasmuch as the benefits in question came as a “windfall” to employees, they may be regarded as pure statutory benefits subject to the further exercise of the legislative power that brought them into being—and, in respect of the enforcement aspects of the liabilities thus imposed upon employers, they obviously have all the attributes which make penalties equally subject to the legislative will.

v. *Crocker*, *supra*; *Lynch v. United States*, 292 U. S. 571, 577 (and cases there cited).

As stated by the Supreme Court in the case of *Flanigan v. Sierra County*, 196 U. S. 553, 560:

The general rule is that powers derived wholly from a statute are extinguished by its repeal. *Sutherland on Statutory Construction*, § 165. And it follows that no proceeding can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 *Bacon's Abridgement*, 226.

Accordingly, it is clear that rights arising from and depending upon legislation alone may be terminated at the will of the legislative body.⁷ For this reason the United States Circuit Court of Appeals for the

⁷ See and cf. *Louisiana v. Mayor*, 109 U. S. 285, 287-288; *McNair v. Knott*, 302 U. S. 369, 372-374 (and cases there cited); *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 311-312, 314-316; *In re Hall*, 167 U. S. 38, 42; *Cummings v. Deutsche Bank*, 300 U. S. 115, 124.

The modification by Section 11 of the Portal-to-Portal Act of the provision for liquidated damages, to permit their judicial reduction or elimination is, of course, similar to retroactive reduction of interest to be included in judgments and is clearly valid for the same reasons. See, *Morley v. Lake Shore Co.*, 146 U. S. 162, 168-169. Cf. *Funkhouser v. Preston Co.*, 290 U. S. 163, 167-168; *Waggoner v. Flack*, 188 U. S. 595, 602-605; *League v. Texas*, 184 U. S. 156, 158-159; *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 439.

The mere fact that a *statutory* claim or defense may be in litigation, either in the trial court or on appeal, does not remove it from the reach of legislation otherwise valid. Cf. *Carpenter v. Wabash Ry. Co.*, 309 U. S. 23, 26-27; *United States v. The Schooner Peggy*, 1 Cranch 103, 108-110; *Western Union Telegraph Co. v. Louisville & Nashville Ry.*, 258 U. S. 13, 19-22. Cf. *Hodges v. Snyder*, 261 U. S. 600, 603-604.

Sixth Circuit found Sections 9 and 11 of the Portal-to-Portal Act to be constitutional in *Rogers Cartage Co. v. Reynolds*, 166 F. (2d) 317, saying:

Sections 9 and 11 of the Portal-to-Portal Act are constitutional. Congress, in the exercise of its power to regulate interstate commerce, may interfere with valuable property rights. *North American Co. v. Securities & Exchange Commission*, 327 U. S. 686, 703. *American Power & Light Co. v. Securities & Exchange Commission*, 329 U. S. 90. While the rights given to employees under the Fair Labor Standards Act are substantial, they did not exist at common law, nor were they established by the United States Constitution. Since they are purely the creature of statute, they may be altered or abolished by the Congress which established them at any time before they have ripened into final judgment. Cf. *Western Union Telegraph Co. v. Louisville & Nashville Ry. Co.*, 258 U. S. 13; *Kline v. Burke*, 260 U. S. 226, 234. The constitutionality of the Act has been recently considered in various District Courts, and invariably upheld. Cf. *Boehle v. Electric Metallurgical Co.*, 72 Fed. Supp. 21.

The Court of Appeals for the Second Circuit ruled similarly in *Darr v. Mutual Life Insurance Company of New York*, 169 F. (2d) 262; certiorari denied, 335 U. S. 871.

For the same reason the Court of Appeals for the Fourth Circuit, in *Seese v. Bethlehem Steel Co.*, 168 F. (2d) 58, held that Section 2 of the act is constitutional. In so ruling, the Court, among other things, said:

What was taken away was the right to recover on claims of purely statutory origin, claims given by statute not as compensation for labor performed but as a means of regulating wages and hours of work in interstate commerce. *Missel v. Overnight Transportation Co.*, 316 U. S. 572; *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697. Even where the contract clause is a limitation upon legislative power, it is universally held that such a claim may be taken away by the legislature without violation of constitutional right. Since the legislature may repeal its own act, it may take away that which has no existence save by virtue of that act. *Norris v. Crocker*, 13 How. 429; *Ewell v. Daggs*, 108 U. S. 143, 151; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646; *A. C. L. R. Co. v. Goldsboro*, 232 U. S. 548; *West Side R. Co. v. Pittsburg Const. Co.*, 219 U. S. 92; *National Carloading Corp. v. Phoenix-El Paso Express*, *supra*. The reason underlying the rule was stated by Mr. Justice Matthews in *Ewell v. Daggs*, *supra*, as follows:

“And these decisions rest upon solid ground.
 * * * The more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms

no element in the rights that inhere in the contract.”

Looked at in another way, all that Congress has done by the legislation here under consideration is to validate the contracts and agreements between employer and employee which were invalid under the Fair Labor Standards Act by reason of the interpretation placed by the Supreme Court upon that act; and the authority of the legislative body to validate voluntary transactions which at the time they were entered into were by statute invalid or illegal has been repeatedly upheld. *West Side R. Co. v. Pittsburgh Const. Co.*, 219 U. S. 92; *McNair v. Knott*, 302 U. S. 369, 372. In other words, the contracts of employment which contemplated that no payment should be made for the portal-to-portal activities but that these were to be compensated by the agreed wage, were invalid only because of the provisions of the Fair Labor Standards Act. There was nothing in law or in reason which forbade Congress to give validity to these contracts retroactively, just as the invalid pledge of securities by National Banking Associations was validated by retroactive legislation in the case of *McNair v. Knott*, *supra*.

Plaintiffs rely upon such cases as *Steamship Co. v. Joliffe*, 2 Wall. 450; *Ettor v. City of Tacoma*, 228 U. S. 148; *Coombes v. Getz*, 285 U. S. 434; and *Duke Power Co. v. South Carolina Tax Comm'n*, 4 Cir. 81 F. 2d 513; but these cases are not in point. They were concerned with vested property rights based on agreements and not on mere statutory pro-

visions without contract or agreement to support them. * * *

Among the cases thus distinguished are those upon which chief reliance is placed by the appellants.⁸

However, in a number of the cases in which the constitutionality of the Portal-to-Portal Act has been challenged, the suggestion has been advanced that while the claims barred by Sections 2, 9, and 11 of the Act may not be contract claims in the pure sense, they nonetheless partake of the contract of employment because all contracts are entered into with implied reference to the existing laws bearing upon the contractual relationship. In the *Seese* case, *supra*, the Court answered this contention as follows:

It is argued that the provisions of the statute must be read into the contract of employment and that the right to recover compensation in accordance with its terms accrues upon the rendering of services. As stated above, however, the true situation with respect to claims affected by the Portal-to-Portal Act is that that act validates the real contract be-

⁸ In the *Ettor* case, for example, the existence of the statute reasonably tended to assure the property owner that he would be reimbursed for damage so that his failure to take protective measures, in *reliance* thereon, constituted a change of position in a contractual sense. (Cf. discussion of these cases in *McLaughlin v. Todd & Brown, Inc.*, D. C. Ind., 7 WH Cases 1014.) Here, however, the "rights" were wholly of statutory creation; were not given in substitution for either a contract or property right which otherwise would have been received or would have continued to exist; and "this is not a case where appellants' conduct would have been different if the present rule had been foreseen" (*Chase Securities Corp. v. Donaldson, supra*, 316).

tween the parties and merely takes away a statutory remedy given by the prior act. Even if the provisions of the Fair Labor Standards Act be read into contracts of employment, so also must be read the constitutional power of Congress to change that act.

It is a predicate of the Act in question that there must have been no consciousness of intention on the part of the contracting parties that the amounts sued for should be paid. Accordingly, the only implied-in-fact agreement on the part of the employer and his employees, which could be said to have a bearing on the matter, would be their implicit agreement to comply with the provisions of the Fair Labor Standards Act as they might thereafter be interpreted by competent authority. However, it is unthinkable that an employer would have intended to bind himself to adhere to an adverse interpretation beyond the period of time that he was under legal obligation to do so.

Any suggestion that interpretations subsequently placed upon the Fair Labor Standards Act became irretrievable parts of each employment contract by force of law should be equally fruitless. "Not only are existing laws read into contracts in order to fix obligations as between parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 435.

No provision of the Fair Labor Standards Act required either implied or actual incorporation of its

terms by parties to such a contract, as terms of the agreement, in such form that later congresses would be unable to alter the conditions of the employment relationship without abrogating the contract provisions.⁹ Any attempt on the part of one Congress so to tie the hands of a future Congress would obviously be open to most serious question on constitutional grounds. (See and cf., e. g., *Lynch v. United States*, 292 U. S. 571; *North American Com. Co. v. United States*, 171 U. S. 110, 137; *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 463; *Boyd v. Alabama*, 94 U. S. 645, 650; *Stone v. Mississippi*, 101 U. S. 814, 817-818; *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558.) Plainly no such result was intended and the Act cannot properly be given that effect. Cf. *Overnight Motor Co. v. Missel*, 316 U. S. 572, 577.

Accordingly, it is clear that insofar as rights given by the Fair Labor Standards Act have not, in fact,

⁹ Bearing in mind the fact that Sections 2, 9, and 11 relieve employers of no liabilities, unless they were unexpected, it is evident that there is no basis for the application of cases holding that existing rights of enforcement, which have been appended to contracts by state law, and which were presumably known to and relied upon by the parties, became parts of the obligation of contracts which the states are forbidden to impair. See, e. g., *Coombes v. Getz*, 285 U. S. 434, 442; *Hawthorne v. Calef*, 2 Wall. 10, 22-23 (cf. *Ochiltree v. Railroad Co.*, 21 Wall. 249, 252-254); *Treigle v. Acme Homestead Assn.*, 297 U. S. 189, 194. Cf. *McCullough v. Virginia*, 172 U. S. 102, 122-125; *Marcus Brown Co. v. Feldman*, 256 U. S. 170, 198; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 435; *Pritchard v. Norton*, 106 U. S. 124, 132, 136-137; *Chase Securities Corp. v. Donaldson*, *supra*, 315-316; *Von Hoffman v. City of Quincy*, 4 Wall. 535, 550; *Gibbes v. Zimmerman*, 290 U. S. 326, 332; *Vance v. Vance*, 108 U. S. 514, 518-522.

become terms of employment contracts, they may be withdrawn by the Congress. Sections 2, 9, and 11 of the Portal-to-Portal Act of 1947, go no further and are clearly constitutional.

3. The Congress had constitutional authority to abrogate the claims in question in order to accomplish legitimate public purposes through the exercise of its interstate commerce power

Even without its plenary power to terminate the purely statutory claims involved by withdrawing their legislative support, the Congress clearly had the power to do so through exercise of its powers over interstate commerce. This would be so even if the claims were not purely statutory, but, as appellants suggest, in some fashion partake of the employment agreement.

Article I, Section 8, of the Constitution gives to the Congress the power:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Under Section 1 of the Portal-to-Portal Act of 1947 the Congress has found that the continued validity of the subject claims would "constitute a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce." And it has declared it to be its policy "to relieve and protect interstate commerce from practices which burden and obstruct it." There can be no question as to the constitutional validity of the end sought to be reached by the Congress. This is the same end that was sought through the enactment of the Fair Labor Stand-

ards Act, upon which the claims now in question depend, the validity of which Act has been established beyond question. *Overnight Motor Co. v. Missel*, 316 U. S. 572, 576-577; *United States v. Darby*, 312 U. S. 100; *Opp Cotton Mills v. Administrator*, 312 U. S. 126.

Of course, it is primarily for the Congress to determine whether and to what extent the existence of such claims interferes with the legislative objective. *Norman v. Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 311-313. There can be no serious question that the findings and policy of the Congress amply support the measures taken by it in Sections 2, 9, and 11 of the Portal-to-Portal Act. And it is clear that the Congress is not required to ignore one classification of related claims merely because the major objective might have been achieved by confining the legislation to certain other classifications. *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, 340, 341.

While Section 10 of Article 1 of the Constitution provides that "No State shall * * * pass any * * * law impairing the obligation of Contracts" and "does not in terms restrict Congress and the United States" (*New York v. United States*, 257 U. S. 591, 601), it is clear that contract rights, like other property rights, are protected by the Fifth Amendment. *Omnia Co. v. United States*, 261 U. S. 502, 508; cf. *Louisville Joint Stock Bank v. Radford*, 295 U. S. 555, 589; *Wright v. Vinton Branch*, 300 U. S. 440, 457. However, it is equally clear that, like other property rights, their ownership is conditioned and subject to the possibility of uncompensated destruc-

tion through the valid exercise of Congressional powers. *Omnia Co. v. United States*, *supra*, 508–510. All contractual relationships between private parties are entered into not only subject to the existing laws of the United States but, as well, to the changes which the Congress may validly make in such laws. Thus in *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, where for valuable consideration a contract had been made to issue free transportation to an individual, the railroad company was thereafter relieved of liability thereunder by an act of Congress interdicting the use of “free transportation.” In so holding the Court (at p. 482) said:

Long before the above cases were decided, it was said in *Knox v. Lee*, 12 Wall. 457, 551, that “as in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of contract can extend to the defeat of legitimate Government authority.”

Again in upholding the validity of congressional action in abrogating gold clauses in private bonds the Supreme Court, through Mr. Chief Justice Hughes, in *Norman v. Baltimore & Ohio R. R. Co.*, *supra* (at p. 307), said:

Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies

within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.¹⁰

In *Overnight Motor Co. v. Missel*, 316 U. S. 572, 577, with reference to the constitutional applicability of the overtime provisions of the Fair Labor Standards Act to a contract of release there involved, the Supreme Court, through Mr. Justice Reed, stated:

If overtime pay may have this [beneficial] effect upon commerce, private contracts made before or after the passage of legislation regulating overtime cannot take the overtime transactions "from the reach of dominant constitutional power." *Norman v. B. & O. R. Co.*, 294 U. S. 240, 306-311.

¹⁰ Attempts to distinguish the *Norman* case, upon the grounds that the creditor could still collect in dollars—hence no property was taken from him—lose sight of the fact that the decision applied as well to "gold value" contracts as to contracts for payment in gold. See the *Norman* case, *supra*, at pp. 298-302; *Guaranty Trust Co. v. Henwood*, 307 U. S. 247, 259-261. The legislation struck down contracts for payment of greater sums of money to be measured by the increased money value of a quantity of gold as well as contracts calling for payment in *speci*. *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, 334, 337-340. By reason of the enactment of the legislation the beneficiaries of "gold clause" obligations became entitled to fewer dollars than they had had a contract right to receive prior to its enactment. The *Norman* case is clearly in point.

Likewise, arguments to the effect that the doctrine of the *Norman* case was overruled *sub silentio* by the later decision in *Louisville Bank v. Radford*, *supra*, are conclusively refuted by the still later decisions in the other cases cited in this note, *supra*.

So far as we are aware, the doctrine of the above-mentioned cases has never been characterized by the Supreme Court as an "emergency doctrine," nor has it been applied unfrequently and merely to deal with emergencies, as appellants suggest. On the contrary, it inheres in the Constitution itself and has found frequent and varied expression in the decisions of the Supreme Court throughout the years.¹¹

Since the rights which have been found to have been given employees by the Fair Labor Standards Act did not involve any pledge of "the credit of the United States" (*cf. Perry v. United States*, 294 U. S. 330, 350-351; *Lynch v. United States*, 292 U. S. 571), the employees' position to resist the exercise of the interstate commerce power by the Congress, through the Portal-to-Portal Act, certainly is not improved by the fact that their claims depend for validity upon prior legislation of the Congress rather than upon contracts. As previously indicated, the Congress has plenary power to withdraw benefits conferred by and resting exclusively upon its prior

¹¹ In addition to the numerous cases cited in the opinion of the Supreme Court in *Norman v. Baltimore & Ohio R. R. Co.*, *supra*, pp. 307-311, see and compare *Fleming v. Rhodes*, 331 U. S. 100, 107; *Guaranty Trust Co. v. Henwood*, 307 U. S. 247, 258-259; *American Power Co. v. S. E. C.*, 329 U. S. 99-100, 103-104; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U. S. 398, 435; *DeLaval Steam Turbine Co. v. U. S.*, 284 U. S. 61, 73; *Mitchell v. Clark*, 110 U. S. 633, 643; *Veix v. Sixth Ward Assn.*, 310 U. S. 32, 38-41; *Calhoun v. Massie*, 263 U. S. 170, 175-176; *Wright v. Union Central Ins. Co.*, 304 U. S. 502, 516; *Graham & Foster v. Goodcell*, 282 U. S. 409, 429-430; *North American Co. v. S. E. C.*, 327 U. S. 686, 707-708; *Holyoke Power Co. v. Paper Co.*, 300 U. S. 324, 341; *Bowles v. Willingham*, 321 U. S. 503, 516-519; *Stewart & Bro. v. Bowles*, 322 U. S. 398, 405.

legislation. Moreover, in absence of the exercise of a constitutional power requiring the assumption of a continuing obligation on the part of the United States, an earlier Congress may not validly restrict later Congresses in the exercise of their constitutional powers. See *Lynch v. United States*, *supra*, 579; *North American Com. Co. v. United States*, 171 U. S. 110, 137; *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 463.

It follows that, even if the rights conferred by the Fair Labor Standards Act could be regarded as “vested” rights in the same sense that contract rights are “vested” rights, the Congress could constitutionally terminate them in the exercise of its power to regulate interstate commerce.

CONCLUSION

For the foregoing reasons the decisions of the Court herein should sustain the constitutionality of the Portal-to-Portal Act of 1947.

Respectfully submitted.

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APPENDIX A

REPORTED DECISIONS OF UNITED STATES DISTRICT COURTS SUSTAINING THE CONSTITUTIONALITY OF THE PORTAL- TO-PORTAL ACT OF 1947 ¹

Ackerman v. J. I. Case Co. (Wisconsin), 74 F. Supp. 639.

Adkins v. E. I. duPont de Nemours & Co. (Oklahoma), 13 Labor Cases, par. 64025, 7 WH Cases 298.

Alameda v. Paraffine Co., Inc. (California), 75 F. Supp. 282.

Asselta v. 149 Madison Ave. Corporation (New York), 79 F. Supp. 413.

Bateman v. Ford Motor Co. (Mich.), 76 F. Supp. 178; affirmed 169 F. (2d) 266; certiorari denied, 335 U. S. 902.

Bauler v. Pressed Steel Car Company, Inc. (Illinois), 15 Labor Cases, par. 64569, 8 WH Cases 55.

Blessing v. Hawaiian Dredging Co. (Dist. of Col.), 76 F. Supp. 556.

Boehle v. Electro Metallurgical Co. (Oregon), 72 F. Supp. 21.

Boerkoel v. Hayes Mfg. Corporation (Michigan), 76 F. Supp. 771.

Bonner v. Elizabeth Arden (New York), 13 Labor Cases, par. 64147, 7 WH Cases 469.

¹ In addition to the cases appearing in this list, and not counting the 267 portal-pay suits dismissed within six weeks after the enactment of the Portal-to-Portal Act (1947 WH 1632), we have been advised of more than 100 District Court decisions dismissing such suits as to which we have been unable to locate published reports.

Borucki v. Continental Baking Co. (New York), 74 F. Supp. 815.

Breusing v. Fisher Body Division (Missouri), 74 F. Supp. 541.

Bumpus v. Remington Arms Co. (Missouri), 74 F. Supp. 788.

Burfeind v. Eagle Picher Co. of Texas (Texas), 71 F. Supp. 929.

Cardinale v. General Motors Corp. (Georgia), 13 Labor Cases, par. 64,088, 7 WH Cases 378.

Cochran v. St. Paul & Tacoma Lumber Co. (Washington), 73 F. Supp. 288.

Colvard v. Southern Wood Preserving Co. (Tennessee), 74 F. Supp. 804.

Darr v. Mutual Life Insurance Company of New York (New York), 78 F. Supp. 28; affirmed 169 F. (2d) 262; *certiorari* denied, 335 U. S. 871.

DeMaio v. Grant Storage Battery Co. (Minnesota), 14 Labor Cases, par. 64,285, 7 WH Cases 721.

Ditto v. American Aluminum Co. (California), 73 F. Supp. 955.

Donovan v. Republic Steel Corp. (New York), 14 Labor Cases, par. 64,295, 7 WH Cases 644.

Etting v. North American Aviation, Inc. of Kansas (Kansas), 13 Labor Cases, par. 64,154, 7 WH Cases 491.

Ferrer v. Waterman Steamship Corporation (Puerto Rico), 76 F. Supp. 601.

Glowienke v. Hawaiian Dredging Co. (Illinois), 14 Labor Cases, par. 64,343, 7 WH Cases 637.

Grazeski v. Federal Shipbuilding & Dry-Dock Co. (New Jersey), 76 F. Supp. 845.

Hart v. Aluminum Co. of America (Pennsylvania), 73 F. Supp. 727.

Hassel v. Standard Oil Company (Ohio), 15 Labor Cases, par. 64,593, 8 WH Cases 41.

Hays v. Hercules Powder Co. (Missouri), 13 Labor Cases, par. 64,123, 7 WH Cases 381.

Holland v. General Motors Corp. (New York), 75 F. Supp. 274; affirmed 169 F. (2d) 254; *certiorari* denied, 335 U. S. 887.

Hollingsworth v. Federal Mining & Smelting Co. (Idaho), 74 F. Supp. 1009.

Hornbeck v. Dain Mfg. Co. (Iowa), 13 Labor Cases, par 64,005, 7 WH Cases 296.

Jackson v. Northwest Airlines, Inc. (Minnesota), 76 F. Supp. 121.

Johnson v. Park City Consol. Mines Co. (Missouri), 73 F. Supp. 852.

Kam Koon Wan v. E. E. Black, Limited (Hawaii), 75 F. Supp. 553.

Kirkham v. Pacific Gas & Electric Co. (California), 13 Labor Cases, par. 64,199, 7 WH Cases 582.

Lasater v. Hercules Powder Co. (Tennessee), 73 F. Supp. 264, affirmed, 171 F. (2d) 263.

Local 626, Etc. General Motors Corp. (Connecticut), 76 F. Supp. 593.

Lockwood v. Hercules Powder Company (Missouri), 78 F. Supp. 716.

McCalpin v. Magnus Metal Corporation (Illinois), 15 Labor Cases, par. 64,633, 8 WH Cases 120.

McLaughlin v. Todd & Brown, Inc. (Indiana), 7 WH Cases 1014.

Markert v. Swift & Co. (New York), 13 Labor Cases, par. 64,145, 7 WH Cases 459.

May v. General Motors Corporation (Georgia), 73 F. Supp. 878.

Miller v. Howe Sound Mining Company (Washington), 77 F. Supp. 540.

Moeller v. Atlas Powder Co. (Connecticut), 76 F. Supp. 707.

Moeller v. Eastern Gas and Fuel Associates (Massachusetts), 74 F. Supp. 937.

Plummer v. Minneapolis-Moline Power Implement Co. (Minnesota), 7 WH Cases 662.

Quinn v. California Shipbuilding Corp. (California), 76 F. Supp. 742.

Reid v. Day & Zimmerman, Inc. (Iowa), 73 F. Supp. 892.

Role v. J. Neils Lumber Co. (Montana), 74 F. Supp. 812; affirmed 171 F. (2d) 706 (C. A. 9).

Sadler v. W. S. Dickey Clay Mfg. Co. (Missouri), 73 F. Supp. 690.

Seese v. Bethlehem Steel Co. (Maryland), 74 F. Supp. 412; affirmed 168 F. (2d) 58.

Sinclair v. U. S. Gypsum Co. (New York), 75 F. Supp. 439.

Smith v. American Can Co. (Illinois), 14 Labor Cases, par. 64,281, 7 WH Cases 603.

Smith v. Colorado Fuel & Iron Corporation (Colorado), 15 Labor Cases, par. 64,755, 8 WH Cases 307.

Smith v. Cudahy Packing Co. (Minnesota), 73 F. Supp. 141 (76 F. Supp. 575).

Sochulak v. American Brake Shoe Co. (New York), 79 F. Supp. 437.

Sparacino v. Colgate Aircraft Corp. (New York), 13 Labor Cases, par. 64,152, 7 WH Cases 397.

Story v. Todd Houston Shipbuilding Corp. (Texas), 72 F. Supp. 690.

